C-580-884
Administrative Review
POR: 1/1/2017 – 12/31/2017
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September 28, 2020

MEMORANDUM TO: Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

FROM: James Maeder
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of the Administrative Review of the Countervailing Duty Order on Certain Hot-Rolled Steel Flat Products from the Republic of Korea; 2017

I. SUMMARY

There is one respondent in the administrative review of the countervailing duty (CVD) order on certain hot-rolled steel flat products (hot-rolled steel) from the Republic of Korea (Korea) covering the period of review (POR) January 1, 2017 through December 31, 2017: Hyundai Steel Co., Ltd. (Hyundai Steel). For these final results, we analyzed the case and rebuttal briefs submitted by interested parties in this administrative review. As a result of our analysis, we have made changes to the *Preliminary Results.*[1] We recommend that you approve the positions described in the "Discussion of Comments" section of this memorandum.

Below is a complete list of the issues for which we received comments from interested parties in this review:

Comment 1: Whether the Electricity for Less Than Adequate Remuneration (LTAR) Upstream Subsidy Allegation Confers a Benefit
Comment 2: Whether the Subsidy Rate for Industrial Technology Innovation Promotion Act Grants Was Improperly Calculated
Comment 3: Whether the Tax Programs Under the Restriction of Special Location Taxation Act (RSLTA) and Restriction of Special Taxation Act (RSTA) Meet the Specificity Requirement

[1] *See Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Preliminary Results of Countervailing Duty Administrative Review, 2017*, 84 FR 67927 (December 12, 2019) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM); *see also* Memorandum, "Post-Preliminary Analysis Memorandum – Upstream Subsidy on Electricity," dated March 11, 2020 (Upstream Subsidy Analysis Memorandum).

Comment 4: Whether the Trading of Demand Response Resources (DRR) Program is Countervailable
Comment 5: Whether the Modal Shift Program Confers a Countervailable Benefit
Comment 6: Whether Commerce Correctly Measured the Benefit for Port Usage Rights at Incheon Harbor
Comment 7: Whether the Suncheon Harbor Usage Fee Exemptions Under the Harbor Act Are Countervailable
Comment 8: Whether Hyundai Green Power is Hyundai Steel's Cross-Owned Input Supplier and Received Countervailable Benefits

II. BACKGROUND

On December 12, 2019, the Department of Commerce (Commerce) published the *Preliminary Results* of this administrative review.[2] In the *Preliminary Results*, Commerce indicated it would issue its preliminary determination on the upstream subsidy on electricity program after the *Preliminary Results*. On December 31, 2019, we issued supplemental questionnaires related to the electricity upstream subsidy program to the Government of Korea (GOK) and Hyundai Steel and received timely responses.[3]

On December 23, 2019, Commerce issued a briefing schedule related to all issues except those pertaining to the alleged upstream subsidy program.[4] On January 22, 2020, Nucor Corporation and United States Steel Corporation (collectively, the petitioners) and the GOK submitted case briefs.[5] On January 31, 2020, the petitioners, the GOK, and Hyundai Steel each timely filed rebuttal briefs.[6]

On March 11, 2020, Commerce determined that Korean hot-rolled steel producers did not benefit from upstream subsidies in the form of subsidized electricity during the POR.[7] Commerce issued a separate briefing schedule with respect to the upstream subsidy on electricity program

[2] *See Preliminary Results.*
[3] *See* GOK's Letter, "Certain Hot-Rolled Steel Flat Products from the Republic of Korea, 01/01/2017-12/31/2017 Administrative Review, Case No. C-580-884: The GOK's Response to the Upstream Subsidy Supplemental Questionnaire," dated January 9, 2020 (GOK January 9, 2020 Upstream SQR); *see also* Hyundai Steel's Letter, "Hot-Rolled Steel Flat Products from the Republic of Korea, Case No. C-580-884: Hyundai Steel Upstream Subsidy Supplemental Questionnaire Response," dated January 10, 2020.
[4] *See* Memorandum, "Briefing Schedule," dated December 23, 2019.
[5] *See* Petitioners' Letter, "Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Case Brief," dated January 22, 2020 (Petitioners Case Brief); *see also* GOK's Letter, "Countervailing Duty Administrative Review of Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Case Brief," dated January 22, 2020 (GOK Case Brief).
[6] *See* Petitioners' Letter, "Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Rebuttal Brief," dated January 31, 2020 (Petitioners Rebuttal Brief); *see also* GOK's Letter, "Countervailing Duty Administrative Review of Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Rebuttal Brief," dated January 31, 2020 (GOK Rebuttal Brief); and Hyundai Steel's Letter, "Certain Hot-Rolled Steel Flat Products from the Republic of Korea, Case No. C-580-884: Hyundai Steel Rebuttal Brief," dated January 31, 2020 (Hyundai Steel Rebuttal Brief).
[7] *See* Upstream Subsidy Analysis Memorandum.

on March 13, 2020.[8] On March 20, 2020, the petitioners timely filed a case brief.[9] On March 25, 2020, Hyundai Steel and the GOK timely filed rebuttal briefs.[10]

On March 19, 2020, Commerce extended the deadline for the final results to 180 days after the publication of the *Preliminary Results*, making the new deadline June 9, 2020.[11] On April 24, 2020, Commerce tolled all deadlines in administrative reviews by 50 days.[12] On July 21, 2020, Commerce tolled all deadlines in administrative reviews by an additional 60 days.[13] The deadline for the final results of this review is now September 28, 2020.

III. CHANGES SINCE THE *PRELIMINARY RESULTS*

The "Discussion of Comments" section contains summaries of the comments and Commerce's positions on the issues raised in the briefs. As a result of this analysis, we have made changes to the subsidy calculations for Hyundai Steel's Port Usage Rights at Incheon Harbor program, to include in the benefit computation certain income which Hyundai Steel was entitled to receive during the POR. For further discussion, *see* "Use of Facts Otherwise Available" section and Comment 6, below.

IV. SCOPE OF THE ORDER

For a full description of the scope of this order, *see* Attachment.

V. PERIOD OF REVIEW

The POR is January 1, 2017 through December 31, 2017.

VI. SUBSIDIES VALUATION INFORMATION

A. Allocation Period

Commerce made no changes to the allocation period or the allocation methodology used in the *Preliminary Results*.[14] No issues were raised by interested parties in case briefs that would lead

[8] *See* Memorandum, "Briefing Schedule for Upstream Subsidy on Electricity Program," dated March 13, 2020.
[9] *See* Petitioners' Letter, "Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Case Brief of United States Steel Corporation and Nucor Corporation," dated March 20, 2020 (Petitioners Upstream Subsidy Brief).
[10] *See* GOK's Letter, "Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Rebuttal on the Petitioners Case Brief of the Upstream Subsidy," dated March 25, 2020 (GOK's Upstream Subsidy Rebuttal Brief); *see also* Hyundai Steel's Letter, "Hot-Rolled Steel Flat Products from the Republic of Korea, Case No. C-580-884: Hyundai Steel's Upstream Subsidy Rebuttal Brief," dated March 25, 2020 (Hyundai Steel's Upstream Subsidy Rebuttal Brief).
[11] *See* Memorandum, "Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Extension of Deadline for Final Results of Countervailing Duty Administrative Review, 2017," dated March 19, 2020.
[12] *See* Memorandum, "Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews in Response to Operational Adjustments Due to COVID-19," dated April 24, 2020.
[13] *See* Memorandum, "Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews," dated July 21, 2020.
[14] *See Preliminary Results* PDM at 7.

us to reconsider our preliminary finding regarding the allocation period or the allocation methodology for the respondent companies.

B. Attribution of Subsidies

Commerce has made no changes to the methodologies used in the *Preliminary Results* for attributing subsidies.[15] No issues were raised by interested parties in case briefs that would lead us to reconsider our preliminary finding regarding the attribution of subsidies.

C. Benchmark Interest Rates

Commerce made no changes to benchmarks or discount rates used in the *Preliminary Results*.[16] No issues were raised by interested parties in case briefs that would lead us to reconsider our preliminary finding regarding benchmark interest rates.

D. Denominators

We have made no changes to the denominators used in the *Preliminary Results*. No issues were raised by interested parties in case briefs that would lead us to reconsider our preliminary finding regarding the appropriate denominators. For a description of the denominators used for these final results, *see* the *Preliminary Results* and accompanying PDM.

VII. USE OF FACTS OTHERWISE AVAILABLE

Sections 776(a)(1) and (2) of the Act of 1930, as amended (the Act) provide that Commerce shall, subject to section 782(d) of the Act, apply facts otherwise available (FA) if necessary information is not on the record or an interested party or any other person: (A) withholds information that has been requested; (B) fails to provide information within the deadlines established, or in the form and manner requested by Commerce, subject to subsections (c)(1) and (e) of section 782 of the Act; (C) significantly impedes a proceeding; or (D) provides information that cannot be verified as provided by section 782(i) of the Act.

Section 776(b) of the Act further provides that Commerce may use an adverse inference in selecting from among the facts otherwise available when a party fails to cooperate by not acting to the best of its ability to comply with a request for information. Further, section 776(b)(2) of the Act states that an adverse inference may include reliance on information derived from the petition, the final determination from the investigation, a previous administrative review, or other information placed on the record. When selecting an adverse facts available (AFA) rate from among the possible sources of information, Commerce's practice is to ensure that the rate is sufficiently adverse "as to effectuate the statutory purposes of the AFA rule to induce respondents to provide Commerce with complete and accurate information in a timely

[15] *Id.* at 7-8.
[16] *Id.* at 8-10.

manner."[17] Commerce's practice also ensures "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."[18] At the same time, section 776(b)(1)(B) of the Act states that Commerce is not required to determine, or make any adjustments to, a countervailable subsidy rate based on any assumptions about information the interested party would have provided if the interested party had complied with the request for information.

Application of Facts Available

Commerce relied on "facts otherwise available" for information relating to non-recurring subsidies received by Hyundai HYSCO, a cross-owned affiliate of Hyundai Steel, for the 2002 through 2005 reporting period.[19] For further discussion of this decision, *see* the *Preliminary Results*.[20] Because no party commented on this finding, Commerce continues to use FA for these final results for subsidies received by Hyundai HYSCO during this portion of the AUL period.

Application of AFA: GOK

On August 13, 2019, we issued a new subsidy allegations questionnaire to the GOK regarding a new subsidy we are investigating in this review.[21] In this questionnaire, we requested the GOK provide the standard questions appendix, grant and allocation appendix, and income tax programs appendix for the provision of port usage rights at the Port of Incheon program. This information included key program procedures and guidelines pertaining to assistance provided under this program used by Hyundai Steel during the POR. In particular, we requested official documentation and program operation information to determine the countervailability of these programs. The GOK did not submit a response to this questionnaire.[22]

Because the GOK failed to provide any information regarding this program, we determine that necessary information is not available on the record and that the GOK withheld information that was requested of it. Further, the GOK significantly impeded the review. Thus, Commerce must rely on "facts available" in making our determination, in accordance with sections 776(a)(1) and 776(a)(2)(A) and (a)(2)(C) of the Act. We determine that the GOK failed to cooperate by not acting to the best of its ability to comply with our request for information. Consequently, an

[17] *See, e.g., Drill Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination*, 76 FR 1971 (January 11, 2011); *see also Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors from Taiwan*, 63 FR 8909, 8932 (February 23, 1998).
[18] *See* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, Vol. I at 870 (1994), reprinted at 1994 U.S.C.C.A.N. 4040, 4199.
[19] *See Preliminary Results* PDM at 11.
[20] *Id.*
[21] *See* Letter to the GOK, "Countervailing Duty Administrative Review of Certain Hot-Rolled Steel Flat Products from the Republic of Korea: New Subsidy Allegations Questionnaire," dated August 13, 2019; *see also* Memorandum, "New Subsidy Allegations," dated August 12, 2019.
[22] *See* Letter to the GOK, "Certain Hot-Rolled Steel Flat Products from the People's Republic of Korea: Countervailing Duty Administrative Review – Denial of Request to Extend Deadline," dated August 28, 2019; *see also* Letter to the GOK, "Certain Hot-Rolled Steel Flat Products from the People's Republic of Korea: Countervailing Duty Administrative Review – Conference Call," dated September 13, 2019.

adverse inference is warranted in the application of facts available, pursuant to section 776(b) of the Act. In applying AFA, we find that the provision of port usage rights at the Port of Incheon program constitutes a financial contribution within the meaning of section 771(5)(D)(ii) of the Act, and that this program is specific within the meaning of section 771(5A)(D)(iii)(I) of the Act. Commerce also relied on FA to determine certain benefits related to Hyundai Steel's usage of the Port of North Incheon, pursuant to section 771(5)(E) of the Act. For further discussion, *see* Comment 6.

VIII. ANALYSIS OF PROGRAMS

A. Programs Determined to be Countervailable

1. RSLTA – Local Tax Exemptions on Land Outside Metropolitan Areas – Article 78

Commerce made no changes to the *Preliminary Results* regarding this program. We continue to find this program to be countervailable for the final results. *See* Comment 3.

Hyundai Steel: 0.02 percent *ad valorem*

2. Tax Deduction Under RSTA Article 26: GOK Facilities Investment Support

Commerce made no changes to the *Preliminary Results* regarding this program. We continue to find this program to be countervailable for the final results. *See* Comment 3.

Hyundai Steel: 0.28 percent *ad valorem*

3. RSTA Article 25(2): Tax Deductions for Investments in Energy Economizing Facilities

Commerce made no changes to the *Preliminary Results* regarding this program. We continue to find this program to be countervailable for the final results. *See* Comment 3.

Hyundai Steel: 0.02 percent *ad valorem*

4. RSTA Article 25(3): Tax Credit for Investment in Environmental and Safety Facilities

Commerce made no changes to the *Preliminary Results* regarding this program. We continue to find this program to be countervailable for the final results. *See* Comment 3.

Hyundai Steel: 0.05 percent *ad valorem*

5. Electricity Discounts under Trading of DRR Program

Commerce made no changes to the *Preliminary Results* regarding this program. We continue to find this program to be countervailable for the final results. *See* Comment 4.

Hyundai Steel: 0.06 percent *ad valorem*

6. Modal Shift Program

Commerce made no changes to the *Preliminary Results* regarding this program. We continue to find this program to be countervailable for the final results. *See* Comment 5.

Hyundai Steel: 0.01 percent *ad valorem*

7. Provision of Port Usage Rights at the Port of Incheon

Hyundai Steel reported that the GOK established this program under the North Inchon Harbor Enforcement Agreement, where, pursuant to Article 5 of the Agreement, "after construction was completed, the wharf constructed by Hyundai Steel reverted to the GOK, and Hyundai Steel was authorized to operate the wharf for a specific period, under the revised agreement."[23] Under this program, once Hyundai Steel had built the wharf and received a specific amount of reimbursements from the GOK, it continued to receive free use of harbor facilities and the right to collect fees from third-party users.[24] The reimbursements received by Hyundai Steel are not limited by the amount of the costs that Hyundai Steel incurred to construct the wharf; instead, once ownership reverted to the GOK, Hyundai Steel was authorized to operate the wharf for a specific period, regardless of the amount of fees collected and amount of the company's personal usage of the harbor facilities.[25]

As discussed above, the GOK was non-responsive regarding this program, and, thus, Commerce is relying on AFA with respect to the financial contribution and specificity determinations. We determine that this program is countervailable because it provides a financial contribution in the form of revenue foregone under section 771(5)(D)(ii) of the Act, and because it is specific under section 771(5A)(D)(iii)(I) of the Act

To calculate the benefit that Hyundai Steel received under this program during the POR, we determined, as facts available, that in accordance with this financial contribution, the berthing income reported by Hyundai Steel was a benefit related to "other" income in

[23] *See* Hyundai Steel's Letter, "Certain Hot-Rolled Steel Flat Products from the Republic of Korea, Case No. C-580-884: Response to Section III of Initial Questionnaire," dated April 1, 2019, at 59-60 and Exhibit M-8 and M-11.
[24] *See* Hyundai Steel's Letter, "Certain Hot-Rolled Steel Flat Products from the Republic of Korea, Case No. C-580-884: New Subsidy Allegation Supplemental Questionnaire Response," dated October 31, 2019 (NSA SQR) at 3. According to this submission, no third party has used the harbor to date.
[25] *See* Letter from Nucor, "Certain Hot-Rolled Steel Flat Products from the Republic of Korea: New Subsidy Allegations," dated April 29, 2019 at 25-26.

connection with Hyundai Steel's own usage of the port.[26] We divided this amount by Hyundai Steel's total sales. On this basis, we determine that Hyundai Steel received a countervailable subsidy rate of 0.06 percent *ad valorem* under this program.[27]

B. Programs Determined to be Not Used or Not to Confer a Measurable Benefit During the POR

1. Korean Export-Import (KEXIM) Bank Import Financing
2. KEXIM Short-Term Export Credits
3. KEXIM Export Factoring
4. KEXIM Export Loan Guarantees
5. KEXIM Loan Guarantees for Domestic Facility Loans
6. KEXIM Trade Bill Rediscounting Program
7. KEXIM Overseas Investment Credit Program
8. Korea Development Bank and Industrial Base Fund Short-Term Discounted Loans for Export Receivables
9. Loans under the Industrial Base Fund
10. Korea Trade Insurance Corporation (K-SURE) Export Credit Guarantees
11. K-SURE Short-Term Export Credit Insurance
12. Long-Terms Loans from Korean Resources Corporation (KORES) and the Korea National Oil Corporation (KNOC)
13. Clean Coal Subsidies
14. GOK Subsidies for Green Technology Research and Development (R&D) and its Commercialization
15. Support for Small and Medium Enterprises "Green Partnerships"
16. Tax Deduction under RSTA Article 10(1)(1)
17. Various R&D Grants Provided Under the Industrial Technology Innovation Promotion Act
18. RSTA Article 10(1)(2)
19. RSTA Article 11
20. RSTA 104(14)
21. RSLTA Articles 19, 31, 46, 84, LTA 109, 112, and 137
22. Tax Reductions and Exemptions in Free Economic Zones
23. Grants and Financial Support in Free Economic Zones
24. Sharing of Working Opportunities/Employment Creating Incentives
25. GOK Infrastructure Investment at Inchon North Harbor
26. Machinery & Equipment (KANIST R&D) Project
27. Grant for Purchase of Electrical Vehicle
28. Power Business Law Subsidies
29. Provision of Liquefied Natural Gas (LNG) for LTAR
30. Energy Savings Programs
    a. Electricity Savings for Designated Period Program

[26] *See* Comment 6 for a discussion on the facts available benefit determination.

[27] *See* Memorandum, "Administrative Review of the Countervailing Duty Order of Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Final Results Calculations for Hyundai Steel Co., Ltd.," dated concurrently with this memorandum (Hyundai Steel Final Results Calculation Memorandum).

b. Electricity Savings through the Bidding Process Program
c. Electricity Savings upon an Emergent Reduction Program
d. Electricity Savings through General Management Program
e. Management of the Electricity Load Factor Program

31. The GOK's Purchases of Electricity for More Than Adequate Remuneration
32. Incentives for Compounding and Prescription Cost Reduction
33. Incentives for Usage of Yeongil Harbor in Pohang City
34. Value Added Tax Exemptions on Imported Goods
35. Incentives for Usage of Gwangyang Port
36. Incentives for Natural Gas Facilities
37. Subsidies for Construction and Operation of Workplace Nursery
38. Subsidies for Hyundai Steel Red Angels Women's Football Club
39. Suncheon Harbor Port Usage Fee Exemptions; *See* Comment 7.
40. Seoul Guarantee Insurance
41. Subsidies for Pohang Art Festival
42. Other Transactions with Government Entities
43. Fast-Track Restructuring Program
44. Reduction for Sewerage Usage Fee

IX. DISCUSSION OF COMMENTS

Comment 1: Whether the Electricity for LTAR Upstream Subsidy Allegation Confers a Benefit

The petitioners alleged that an upstream subsidy exists related to the sale of electricity in Korea. Specifically, the petitioners claim that in 2017 the Korean electricity generators (GENCOs) sold electricity to the Korean Electric Company (KEPCO) via the Korean Power Exchange (KPX), and the prices for this electricity were at LTAR. After collecting and analyzing information related to the Korean electricity market, we preliminarily found that a benefit was not conferred from KPX's pricing of the electricity generated by the GENCOs and that an upstream subsidy was not provided to hot-rolled steel producers, including Hyundai Steel.[28]

Petitioners' Case Brief

- Commerce correctly found in its post-preliminary analysis that there is no viable tier (i) benchmark on the record upon which to measure adequate remuneration, as the market is distorted and it is illogical to use these same prices to analyze market principles under a tier (iii) analysis.[29]

[28] *See* Upstream Subsidy Analysis Memorandum.

[29] *See* Petitioners Upstream Subsidy Brief at 9-11 (citing *Steel Concrete Reinforcing Bar from the Republic of Turkey: Final Affirmative Countervailing Duty Determination Final Affirmative Critical Circumstances Determination*, 79 FR 54963 (September 15, 2014), and accompanying Issues and Decision Memorandum (IDM) at 15; *Certain Steel Wheels from the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination*, 77 FR 17017 (March 23, 2012), and accompanying IDM at 24; *Supercalendered Paper from Canada: Final Affirmative Countervailing Duty Determination*, 80 FR 63535 (October 20, 2015) (*SC Paper*), and accompanying IDM at 41; *Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Russian Federation: Final Affirmative*

- Commerce has interpreted the term "adequate remuneration" to mean "fair market value." Thus, the fact that a government sets a price at a level which is both profitable and allows for cost recovery, in and of itself, does not mean the price reflects fair market value. In addition to cost recovery and profitability, a price-setting methodology is only consistent with market principles insofar as it permits the maximization of profit and market share. There is ample evidence on the record that the KPX price-setting methodology does not allow the prices of KEPCO's GENCOs to reflect fair market value. For example, based on the merit order system, an electricity generator could reduce its price without gaining any competitive advantage, and the GENCOs could raise their prices and not lose any sales volume or market share.[30]
- The fact that the GENCOs received a higher rate of return than KEPCO, their affiliated electricity distributor, is irrelevant. Instead, a proper analysis would be to compare the rate of return among the GENCOs, Independent Power Producers (IPPs), and other independent generators.[31]
- The above comparison should also take into account public statements from Korea Hydro & Nuclear Power Co., Ltd. In its 2018 Offering Circular, the company indicated the downward adjustment of the adjusted coefficient in 2017 contributed to a decrease in its revenue compared to 2016. Further, the decrease in the average unit price of electricity sold in early 2018 was mainly due to a decrease in the adjusted coefficient applicable to nuclear energy.[32]
- The regulations that require KEPCO to correct for the losses incurred by the GENCOs indicate that the Korean wholesale electricity market does not operate consistent with market principles.[33]
- As shown in *SC Paper*, Commerce's practice is to use a tier (iii) benchmark to measure adequate remuneration. As Commerce did not collect sufficient cost information on the record to construct a benchmark, the IPPs prices from KPX would serve as viable tier (iii) benchmarks.[34]
- The Electricity for LTAR Upstream Subsidy program has also met the statutory requirements in terms of financial contribution and specificity. On this basis, Commerce has evidence on the record to find that this alleged program provides a countervailable upstream subsidy to producers of subject merchandise.[35]

Countervailing Duty Determination and Final Negative Critical Circumstances Determination, 81 FR 49935 (July 29, 2016) (*Cold-Rolled Steel from Russia*), and accompanying IDM at 55; and *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 61 F. Supp. 3d 1306, 1327 (CIT 2015) (citing *Wire Decking from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 75 FR 32902 (June 10, 2010), and accompanying IDM, affirmed by *Maverick Tube Corporation v. United States*, 857 F3d 1353 (Fed. Cir. 2017))).

[30] *Id.* at 11-15 (citing *Policy Bulletin – Policies Regarding the Conduct of Changed Circumstances Reviews of the Countervailing Duty Order on Softwood Lumber from Canada*, 68 FR 37457 (June 24, 2003) (Lumber Policy Bulletin); *Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act*, 68 FR 37125, 37132 (June 23, 2003) (*Privatization Practice FR*); *Light-Walled Rectangular Pipe and Tube from People's Republic of China: Final Affirmative Countervailing Duty Investigation Determination*, 73 FR 35642 (June 24, 2008) (*LWRP from China*), and accompanying IDM at Comment 7; and *Nucor Corp. v United States*, 927 F.3d 1243 (Fed. Cir. 2019) (*Nucor*)).

[31] *See* Petitioners Upstream Subsidy Brief at 16-17.

[32] *Id.* at 18, n.38.

[33] *Id.* at 18-19.

[34] *Id.* at 19-23 (citing *SC Paper*).

[35] *Id.* at 23-28.

GOK Rebuttal Brief

- Public utility markets, such as electricity, are monogopolistic or oligopolistic regulated markets and do not exhibit open and competitive characteristics. Therefore, as upheld in several U.S. courts, the electricity market does not need to have electricity generators maximize profits for pricing to reflect a fair return on investment.[36]
- Commerce does not have a practice that requires the use of a tier (iii) benchmark.[37]
- The record evidence demonstrates that KPX prices are based on market principles and the calculation of a benchmark price is not necessary under the tier (iii) analysis. Moreover, Commerce has stated that IPP prices are not comparable and, thus, cannot be used as tier (iii) benchmarks.[38]
- Even if a benefit is found for the alleged subsidy, the petitioners' allegation with respect to financial contribution and specificity does not meet the statutory requirements. Moreover, the alleged subsidy would not confer a competitive benefit, as defined in section 771A of the Act, and therefore, it would not provide an upstream subsidy to producers of subject merchandise.[39]

Hyundai Steel Rebuttal Brief

- Commerce found that there were no comparable electricity prices in its tier (i) analysis, not that there was a distortion in the market.[40] Commerce's prior proceedings make plain a tier (iii) market principles analysis is applicable in this situation.[41]

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[36] *See* GOK's Upstream Subsidy Rebuttal Brief at 2-4 (citing U.S. Code § 824d; *Alabama Electric Cooperative, Inc. v. FERC*, 684 F.2d 20, 27 (District of Columbia Circuit 1982); *Bluefield Co. v. Pub. Serv. Comm., 262 U.S. 679, 690* (1923); *Hope, FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 604 (1994); *Potomac Edison Co. v. Pub. Serv. Comm.*, 279 Md. 573, 369 A.2d. 1035 (1977); and *Nucor*, 927 F.3d at 1254-55).

[37] *Id.* at 6-8 (citing *Arcelormittal USA v. United States*, Slip-Op. 18-121 (CIT 2018) at 14; *Silicon Metal from Australia: Final Affirmative Countervailing Duty Determination*, 83 FR 9834 (March 8, 2018) (*Silicon Metal from Australia*), and accompanying IDM at 10-11; and *Melamine from Trinidad and Tobago: Final Affirmative Countervailing Duty Determination*, 80 FR 68849 (November 6, 2015), and accompanying IDM at 10).

[38] *Id.* at 8-10.

[39] *Id.* at 9-13.

[40] *See* Hyundai Steel's Upstream Subsidy Rebuttal Brief at 4-6.

[41] *Id.* at 6-8 (citing *Countervailing Duties*, 63 FR 65348, 65378 (November 25, 1998) (*CVD Preamble*); *Certain Carbon and Alloy Steel Cut-To-Length Plate from the Republic of Korea: Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 82 FR 16341 (April 4, 2017), and accompanying IDM at 28-33; *Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Final Affirmative Determination*, 81 FR 53439 (August 12, 2016) (*HRS Final Determination*), and accompanying IDM at 44-49; *Countervailing Duty Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part*, 81 FR 5310 (June 2, 2016), and accompanying IDM at 18-24; *Countervailing Duty Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea: Preliminary Affirmative Determination*, 80 FR 68842 (November 6, 2015), and accompanying PDM at 19; *Welded Line Pipe from the Republic of Korea: Final Negative Countervailing Duty Determination*, 80 FR 61365 (October 13, 2015) (*Welded Line Pipe*), and accompanying IDM at 13-18; *Nucor Corp v. United States*, 286 F. Supp. 3d 1364, 1375 (CIT 2018); *Maverick Tube Corp. v. United States*, 273 F. Supp. 3d 1293, 1309-10 (CIT 2017) (*Maverick Tube Corp.*); *POSCO v. United States*, 337 F. Supp 3d 1265, 1282 (CIT 2018); *POSCO v. United States*, 353 F. Supp. 3d 1357, 1372-73 (CIT 2018); and *POSCO v. United States*, 296 F. Supp 3d 1320, 1360-61 (CIT 2018)).

- Commerce's tier (iii) analysis is in accordance with law. Commerce should reject the assertion that adequate remuneration must include the maximization of profit and market share.[42]
- The tier (iii) analysis is a mechanism to measure adequate remuneration in regulated utility markets, like electricity, where prices are not solely dictated by supply and demand.[43]
- *SC Paper* does not stand for the proposition that Commerce must always use a tier (iii) benchmark. It only demonstrates that Commerce has the discretion to use a benchmark when analyzing prices under tier (iii).[44]
- The IPP prices through KPX are not viable tier (iii) benchmarks, as the prices are not comparable to the GENCOs' prices through KPX. Moreover, if Commerce were to compare the prices paid to the IPPs and GENCOs, based on fuel type, record evidence demonstrates the per-unit prices are similar and consistent with market principles.[45]
- Commerce considered, and rejected, the same arguments by the petitioners in the recent final results of *CORE Korea 2017 Final*.[46]

Commerce's Position: We continue to find that a benefit was not conferred by the alleged Electricity for LTAR Upstream Subsidy program for the final results. In determining whether a benefit was conferred, Commerce evaluated the program pursuant to 19 CFR 351.511 and examined KPX pricing within tier (i), tier (ii), and tier (iii) as provided in 19 CFR 351.511(a).[47]

First, the petitioners argue it is illogical to find KPX prices[48] for electricity to be distorted under tier (i) and consistent with market principles under tier (iii). Under a tier (i) analysis, Commerce seeks to measure the adequacy of remuneration by comparing a government price to a market-determined price for the good or service resulting from actual transactions.[49] In this instance, Commerce preliminarily found that the KPX set prices for nearly all the electricity in Korea, including the prices paid to the IPPs, and, therefore, that the prices paid to the IPPs were not appropriate benchmarks.[50] Hence, there were no comparable prices on the record to use as a tier (i) benchmark.

The case cites by the petitioners misconstrue Commerce's use of a tier (iii) benchmark to measure adequate remuneration and do not relate to our rationale for not using a tier (i) benchmark.[51] In each of these examples, the petitioners contend Commerce rationalized that use

[42] *Id.* at 8-9 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-43 (1984); *Timken Co. v. United States*, 354 F. 3d 1334, 1342 (Fed. Cir. 2004) (quoting *Torrington V. United States*, 82 F. 3d 1039, 1044 (Fed. Cir. 1996); and *Nucor*, 927 F.3d at 1254-55)).
[43] *Id.* at 9-11 (citing *Nucor*, 927 F.3d at 1251, n.6; and *Maverick Tube Corp.*, 273 F. Supp. 3d at 1309).
[44] *Id.* at 11 (citing *Certain Uncoated Paper from Indonesia: Final Affirmative Countervailing Duty Determination*, 81 FR 3104 (January 20, 2016) (*Uncoated Paper from Indonesia*), and accompanying IDM at 15).
[45] *Id.* at 12.
[46] *Id.* at 13 (citing *Certain Corrosion-Related Steel Products from the Republic of Korea: Final Results of Countervailing Duty Administrative Review; 2017*, 85 FR 15112 (March 17, 2020) (*CORE Korea 2017 Final*), and accompanying IDM at Comment 1 at 12-18).
[47] *See* Upstream Subsidy Analysis Memorandum at 5-9.
[48] *Id.* at 8 (nearly all of the electricity generated within Korea is sold through KPX to one distributor, KEPCO).
[49] *See* 19 CFR 351.511(a)(2)(i).
[50] *See* Upstream Subsidy Analysis Memorandum at 6.
[51] *See* Petitioners Upstream Subsidy Brief at 10, and n.15 and 16.

of a market-determined price in a distorted market would essentially be comparing a government price to itself and that would not lead to an adequate measurement of remuneration. To be clear, the price being distorted in these cited examples is the "market" price, not the government price. In this instance, however, Commerce did not find the KPX prices paid to IPPs to be distorted market prices.[52] Our analysis concluded the GENCOs and the IPPs participated in the same KPX pricing system and its structure did not allow comparability between the prices paid to the two groups.[53] The *CVD Preamble* already contemplated a possibility where there may not be prices available at tier (i) and tier (ii). In those circumstances, we can evaluate the government price in the context of market principles under tier (iii).[54] Under tier (iii), our focus is on whether the government price was established in accordance with market principles rather than how the government price compares with a domestic or world market-determined price. Therefore, there is no disconnect in our analysis of the KPX prices under tier (i) versus tier (iii).

The petitioners next argue KPX's price-setting mechanism is not consistent with market principles (*i.e.*, tier (iii)) as the mechanism sets prices that do not reflect fair market value, which should include the maximization of profit and market share.[55] We note that section 771(5)(E)(iv) of the Act states "the adequacy of remuneration shall be determined in relation to the prevailing market conditions for a good or service being provided … Prevailing market conditions include price, quality, availability, marketability, transportation and other conditions of purchase of sale." Moreover, 19 CFR 351.511(a)(2) sets out how adequate remuneration is defined and lays out the three-tiered analysis to measure the extent a benefit exists.

Commerce reviewed and verified: (1) KPX's methodology used to forecast demand; (2) KPX's methodology to set the system marginal price; (3) the electricity generator's reporting requirements to establish variable and fixed costs; and (4) the underlying methodology to determine the electricity generator's rates of return and the adjusted coefficient.[56] KEPCO's tariff rates applicable to its customers are approved by the Ministry of Trade, Industry and Energy.

As noted in the Upstream Analysis Memorandum, the KPX bidding process looks at demand on an hourly basis and establishes the price paid for the hour on a merit order system.[57] Under this process, an electricity generator increasing capacity could increase its market share, an electricity generator lowering its marginal price below that of a competitor with a high capacity could gain market share, and a GENCO who has a high marginal price and establishes the system marginal

[52] *See* Upstream Subsidy Analysis Memorandum at 6.
[53] *Id.*
[54] *See CVD Preamble*, 63 FR at 65378 ("In situations where the government is clearly the only source available to consumers in the country, we normally will assess whether the government price was established accordance with market principles. Where the government is the sole provider of a good or service, and there are no world market prices available or accessible to the purchaser, we will assess whether the government price was set in accordance with market principles … In our experience, these types of analyses may be necessary for goods or services as electricity …").
[55] *See* Petitioners Upstream Subsidy Brief at 10, and n.15 and 16.
[56] *See* Upstream Subsidy Analysis Memorandum at 7-8; *see also* Commerce's Letter, "Submission of Verification Documents to Proceeding," dated January 31, 2020; and GOK's Letter, "Certain Hot-Rolled Steel Flat Products from the Republic of Korea, 01/01/2017-12/31/2017 Administration Review, Case No. C-580-884: Submission of Verification Documents," dated February 7, 2020 (GOK Verification Report) at 3-6.
[57] *See* Upstream Subsidy Analysis Memorandum at 3.

price could be priced out of the market by another electricity generator that lowers its marginal price and takes its place and fulfills the balance of the hourly demand, pushing the GENCO outside the purchase order hour.[58]

The petitioners posit several reasons why prices set by the KPX bidding process in the Korean electricity market may not represent fair market value or market principles, but all of the petitioners' reasons are speculative in nature.[59] For example, the petitioners claim that the system is not market-based because, they allege, there is no reason for generators to sell electricity well below the competitor with the next lowest price, as reducing one's electricity price would not result in increased market share or sales; indeed, according to the petitioners, every single GENCO could raise its prices and not lose any sales volume or market share.[60] However, the petitioners have not addressed the prevailing market of the Korean electricity market as it pertains to the: (1) structure of the KPX system; (2) varying reporting data that is part of the variable costs; (3) the electricity generators submission of financial data (including costs); (4) weight average cost of capital calculation; (5) adjusted coefficient; and (6) other standardized formulas used in KPX's price setting.[61]

The petitioners further their argument with regard to the maximization of profit and market share not equating to cost recovery and profit with references to the Lumber Policy Bulletin, *Privatization Practice FR*, *LWRP from China*, and *Nucor*.[62] As an initial matter, we note the Lumber Policy Bulletin has not been adopted by Commerce and the current CVD order on *Certain Softwood Lumber Products from Canada* applied our benchmark regulations (*i.e.*, 19 CR 351.511(a)(2)(i)).[63] In *LWRP from China*, the respondents requested a tier (iii) analysis for a hot-rolled steel (HRS) producer.[64] However, Commerce only determined the HRS producer's profitability was not relevant in the context of the tier (i) analysis and subsequently used a tier (ii) benchmark.[65] Thus, the issue of market principles under tier (iii) was never addressed in *LWRP from China*, as Commerce was able to find a tier (ii) world market price for HRS, an input

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[58] *Id.* at 4, n.25 (providing examples of per unit prices from GENCOs based on fuel types); *see also* GOK January 9, 2020 Upstream SQR at Exhibit USQ-16, page 14 (demonstrating fuel types from low price to high price in determining the SMP), and Exhibit USQ-10, pages 43-49 (KEPCO reported 20-F providing average cost per kilowatt hour for different fuel types: Nuclear (from KHNP): 10.29 Won; Pumped Storage and Hydroelectric (from KHNP): 11.00 Won; Bituminous Coal (from Midland, KSEP, KWP, KSP and KEWP): 48.46, 50.37, 53.63, 49.31, 65.51, 53.43, 50.4, 58.7, 80.97 and 93.77 Won; Anthracite Coal (from Midland, KSEP and KEWP): 72.38, 101.38 and 99.77 Won; Oil (from Midland, KWP, KSP and KEWP): 144.77, 110.61, 152.5 and 176.75 Won; and LNG (from Midland): 188.79 Won).

[59] *See* Petitioners Upstream Subsidy Brief at 13-16.

[60] *Id.* at 14-15.

[61] *See* GOK Verification Report at 4-6; *see also* Upstream Analysis Memorandum at 7-8.

[62] *See* Petitioners Upstream Subsidy Brief at 13-14.

[63] *See Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination, and Final Negative Determination of Critical Circumstances*, 82 FR 51814 (November 8, 2017), and accompanying IDM at 104 ("The {Lumber Policy Bulletin} was a preliminary document, through which comments were solicited from the public pertaining to proposed policies for Canadian provinces to move to market-based systems of timber sales. Those proposed policies, however, were never adopted by {Commerce}… Rather, consistent with {Commerce's}practice we have thoroughly evaluated the record evidence to reach a finding on the market conditions existing within a provincial stumpage system pursuant to the framework set forth in 19 CFR 351.511(a)(2)(i).").

[64] *See LWRP from China* IDM at 33.

[65] *Id.* at 36-37.

that is globally traded and does not have the limitations of the Korean electricity market that may necessitate a tier (iii) analysis.[66]

In *Nucor*, the dissenting opinion did not state that cost recovery is not synonymous with fair market value, but that cost recovery, in this instance, should be defined and explained in light of the statutory requirement under section 771(5)(E)(iv) of the Act.[67] In this instance, Commerce has evaluated the Korean electricity market as it pertains to the generation of electricity and how the GENCOs receive remuneration for the generation of electricity within Korea. The laws, regulations, economic rationale, and submitted cost and other required data have been examined and analyzed pursuant to the statute and regulations in determining that KPX's prices, through the price-setting mechanism and cost, are consistent with market principles.[68] Finally, in *Privatization Practice FR*, Commerce stated that it does consider profit maximization as a criterion in evaluating a privatization for fair market value. However, we also stated that, in the case of privatization, none of the factors listed, including profit maximization, are dispositive and all relevant facts and circumstances of a privatization will be considered.[69] Although we are not examining a privatization, we have considered all relevant facts and considerations in our analysis, and the petitioners have provided no support for the proposition that maximization of profit and market share is the main factor that should inform our tier (iii) analysis or determine if a good is provided for LTAR.[70]

The petitioners also argue the GENCOs' receipt of a higher rate of return than their affiliated electricity distributor, KEPCO, is irrelevant and a proper analysis would be to compare the rate of return among the GENCOs, IPPs, and other independent generators.[71] Commerce's regulations do not call for a tier (iii) analysis to be a strict comparison of rates of returns or to require that an entity absolutely maximize its returns; rather the regulations state that such rate of return ought to be "sufficient to ensure future operations."[72] The GOK has provided information

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[66] *See CVD Preamble*, 63 FR at 65377-78.
[67] *See Nucor*, 927 F.3d at 1258 ("The majority does not explain what 'familiar standards of cost recovery' means or how they are consistent with the statutory requirement that price setting be in accordance with prevailing market conditions. The majority constructs …").
[68] *Id*. 927 F.3d at 1254-55 ("In our analysis rejecting the government's broad position, we have decided that nonpreferentiality of the sort the government stresses is insufficient to meet the statutory standard of adequate remuneration, which, along with its implementing regulation, requires ensuring that the government authority's price is not too low considering what the authority is selling. That ruling is significant but limited in constraining Commerce. We readily recognize that such a standard, while excluding the government's broad preferentiality position potential, leaves a large range of potential implementation choices. One need only look outside the present statutory context to the familiar rate-regulation context to see the great variety of methodologies used over time to ensure that rates of a monopoly provider are not too low, some directly focused on value (such as "fair value"), some on various measures of "cost" (which may reflect value). Commerce has considerable prima facie leeway to make a reasonable choice within the permissible range, and properly justify its choice, based on the language and policies of the countervailing duty statute as well as practicality and other relevant considerations.") (internal citations omitted).
[69] *See Privatization Practice FR*, 68 FR at 37131 ("We will generally not consider any one factor in itself to be dispositive, but will consider all the relevant facts and circumstances of a privatization to determine whether the sales price was a fair market value.").
[70] *See* Upstream Subsidy Analysis Memorandum.
[71] *See* Petitioners Upstream Subsidy Brief at 16-17.
[72] *See CVD Preamble*, 63 FR at 65378 ("Paragraph (a)(2)(iii) provides that, in situations where the government is

on the record concerning its rate of return methodology or weighted average cost of capital (WACC) formula for the KPX pricing that provides a fair market return on capital.[73] The petitioners do not provide any rationale for why a comparison of the rates of return across all electricity generators would inform a tier (iii) benchmark analysis. Under a tier (iii) market principles analysis, Commerce examined KPX prices and the relevant price setting mechanism. As part of the review, we have analyzed and verified that the WACC formula operates within the KPX pricing and provides a fair market return on capital. We also confirmed how the KPX pricing in place recognizes and accounts for the higher risk to return on investment associated with the GENCOs than that of their affiliated distributor, KEPCO, and accounts for this in the calculation of the adjusted coefficient. We have also confirmed that the costs and other financial data submitted by the electricity generators to KPX and the differences in fuel types are also accounted for in KPX's adjusted coefficient.[74] The fact that the GENCOS have a higher rate of return in relation to KEPCO is only one of many factors considered in our tier (iii) analysis.

The petitioners have also mischaracterized language cited from Korea Hydro & Nuclear Power Co., Ltd.'s 2018 Offering Circular.[75] The same document also notes that the adjusted coefficient was revised upward in 2016 which contributed to an increase in revenue in 2016 as compared to 2015.[76] We find that it is practical to assume that revenue will rise and fall with changes to the adjusted coefficient. However, the petitioners present no other argument or support – based on the record information, the prevailing market conditions of the Korean electricity market, or the basis of how the adjusted coefficient is calculated – for their claim. They focus solely on the fact that the adjusted coefficient does not allow the GENCOs to maximize profit. They even go as far to say that "there is no evidence that the IPPs' prices and rates of return are artificially capped in the same way as the GENCOs." While factually correct, certain IPPs are subject to an adjusted coefficient, which does not include a consideration of KEPCO's rate of return; in their profit maximization argument, the petitioners choose only to cast a line between the GENCOs' adjusted coefficient methodology and IPPs' prices and rates of return, without considering and addressing the rationale and nuance that exists in the Korean electricity market.[77]

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clearly the only source available to consumers in the country, we normally will assess whether the government price was established in accordance with market principles. Where the government is the sole provider of a good or service, and there are no world market prices available or accessible to the purchaser, we will assess whether the government price was set in accordance with market principles through an analysis of such factors as the government's price-setting philosophy, costs (including rates of return sufficient to ensure future operations), or possible price discrimination. We are not putting these factors in any hierarchy, and we may rely on one or more of these factors in any particular case. In our experience, these types of analyses may be necessary for such goods or services as electricity, land leases, or water, and the circumstances of each case vary widely.").

[73] *See* GOK's Letter, "Certain Hot-Rolled Steel Flat Products from the Republic of Korea, 01/01/2017-12/31/2017 Administrative Review, Case No. C-580-884: The Republic of Korea's Response to the Countervailing Duty Initial Questionnaire," dated March 25, 2019 (GOK's March 25, 2019 IQR) at Exhibit E-4; *see also* GOK Verification Report at 4-6.

[74] *See* Upstream Subsidy Analysis Memorandum at 8.

[75] *See* Petitioners Upstream Subsidy Brief at 16, footnote 31.

[76] *See* Petitioners' Letter, "Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Petitioners' Allegation of Upstream Subsidies to Korean Steel Producers," dated April 29, 2019 at Exhibit 1.

[77] *See* GOK's Letter, "Certain Hot-Rolled Steel Flat Products from the Republic of Korea, 01/01/2017-12/31/2017 Administrative Review, Case No. C-580-884: The GOK's Response to the Upstream Subsidy Questionnaire," dated October 15, 2019 at 12 ("In principle, the adjusted coefficient factor is applied to all nuclear and coal-fired generation units in operation regardless of whether they are operated by KEPCO's wholly owned generation

The petitioners also misconstrue our statement in the Upstream Analysis Memorandum that KEPCO "will, if necessary reimburse the GENCOs for costs, even if the company is in a loss position."[78] The petitioners' reliance on KEPCO's 20-F is misplaced, as the conditions articulated in KEPCO's 20-F[79] and our statement in the Upstream Analysis Memorandum are not similar. First, the language from the 20-F pertains to situations where the GENCOs receive excessive profits. As noted above, one of the functions of the adjusted coefficient for the GENCOs is to ensure a fair rate of return between the GENCOs and KEPCO. The statement in KEPCO's 20-F confirms this concept in that, if the GENCOs do receive excessive profits and KEPCO incurs a loss situation, the GENCOs must correct this imbalance. This situation may be effectuated in many ways, one of which could be a modification to the adjusted coefficient. The regulation described in the Upstream Analysis Memorandum has nothing to do with KEPCO's being in a loss situation while the GENCOs have received excessive profits. Rather, the regulation merely states that the GENCOs' costs must be covered by KEPCO, even if KEPCO is in a loss position.[80] Hence, KEPCO may not purchase electricity generated by the GENCOs at a price that does not fully cover the GENCOs' costs. Again, the statement is not dispositive of market principles or used in determining adequate remuneration, but it is one of many factors that establish how the KPX price setting mechanism operates and other factors that may impact the Korean electricity market. In this instance, the regulation, implemented in 2015, lays out how, and the extent to which, the GENCOs shall be compensated if KEPCO is in a loss position.[81] We note that there is no record evidence that this situation existed in 2017, nor have the petitioners argued that it did. Finally, the petitioners' arguments pertaining to the original investigation of the electricity for LTAR allegation is inapposite. The original investigation covered calendar year 2014 and this regulation was implemented in 2015, one year later. Moreover, KEPCO's pricing mechanism was based on cost, and a component of KEPCO's cost was the price paid for the electricity through KPX.[82] So, it is not clear how this regulation invalidates our prior analysis, as it was demonstrated through record evidence in the

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facilities or private independent power producers, and is set for the generators to receive just amount to recover all costs for generating electricity and a fair amount of investment calculated with the weighted average cost of capital formula (Exhibit USQ-24)") and 39-40 ("Adjusted coefficient is using the WACC formula and their cost (both variable and fixed) to generate electricity. There is one more step taken for KEPCO's wholly owned generation facilities … additionally adjusted to keep the ratio between KEPCO's fair amount of investment return and KEPCO's wholly owned generation facilities' fair amount of investment return"); *see also* GOK Verification Report at 5 and 6 ("KPX officials provided the following formula to calculate the adjusted coefficient … KPX officials explained the KEPCO, GENCOs, and IPPs provide financial statements, budget and other financial information to the Market & System Development Department. {Commerce} calculates the weighted average cost of capital (WACC) that is the return on investment (ROI) and included in the adjusted coefficients" and "We also observed the costs provided by the GENCOs and KEPCO used in the adjusted coefficient.").

[78] *See* Upstream Subsidy Analysis Memorandum at 8-9.

[79] *See* Petitioners Upstream Subsidy Brief at 18 (quoting the 20-F, "{T}he adjusted coefficient must be determined so that the price of electricity sold by our generation subsidiaries to us shall have the effect of ensuring a fair rate of return to us as a standalone entity, which means any imbalance caused by excessive profits taken by our generation subsidiaries to our loss must be corrected.").

[80] *See* Upstream Subsidy Analysis Memorandum at 8-9.

[81] *See* GOK Verification Report at 6 ("KEPCO will have to compensate the GENCOs for their costs, even if the company is in a loss position.") (citing GOK's August 12, 2019 Translation of Upstream Subsidy Questionnaire Response (QRT) at Exhibit 6 (Article 8.4.2.4.2)).

[82] *See HRS Final Determination* IDM at 23.

investigation that KEPCO fully covered its costs.[83] KEPCO's costs and underlying methodology were also examined in this administrative review and no discrepancies were found.[84]

Finally, the petitioners argue Commerce should establish a tier (iii) benchmark in determining the extent of adequate remuneration in the Korean electricity market, and they cite to *SC Paper* as support for this exercise.[85] With regard to electricity, Commerce has normally conducted a tier (iii) analysis based on market principles.[86] When Commerce has applied a tier (iii) benchmark, it has done so after first concluding that the government price is not consistent with market principles.[87] With regard to *SC Paper*, Commerce determined the Nova Scotia electricity market applied market principles in setting tariffs under a tier (iii) analysis.[88] However, the respondent's rate in the proceeding was established outside this general price setting structure and was determined not to be a market-determined price.[89] Thus, an alternate was developed using a tier (iii) benchmark to determine the benefit.[90] In this instance, the GOK has provided the requested information and it was verified.[91] Our determination has fully examined the extent

[83] *Id.*
[84] *See* GOK Verification Report at 8.
[85] *See* Petitioners Upstream Subsidy Brief at 19-23.
[86] *See, e.g.*, *Glycine from Thailand: Final Negative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 84 FR 38007 (August 5, 2019) (*Glycine from Thailand*), and accompanying IDM at "1. The Provision of Electricity at LTAR," and Comments 3 and 4; *Silicon Metal from Australia* at "1. The Provision of Electricity for Less Than Adequate Remuneration"; *SC Paper* IDM at "12. GNS Preferential Electricity Rate for Port Hawkesbury"; *Final Negative Countervailing Duty Determination: Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago*, 67 FR 55810 (August 30, 2002), and accompanying IDM at "C. Provision of Electricity"; *Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products from Thailand*, 66 FR 50410 (October 3, 2001), and accompanying IDM at "B. Provision of Electricity for Less Than Adequate Remuneration"; *Final Affirmative Countervailing Duty Determination: Steel Wire Rod from Venezuela*, 62 FR 55014, 55021-22 (October 22, 1997); and *Final Affirmative Countervailing Duty Determination: Steel Wire Rod from Trinidad and Tobago*, 62 FR 55003, 55006-07 (October 22, 1997) (*Steel Wire Rod from Trinidad and Tobago*).
[87] *See, e.g.*, *Glycine from Thailand* IDM at "1. The Provision of Electricity at LTAR," and Comments 3 and 4; *Cold-Rolled Steel from Russia* IDM at "1. Provision of Natural Gas for LTAR"; *Uncoated Paper from Indonesia* IDM at "1. Provision of Standing Timber for Less Than Adequate Remuneration"; *SC Paper* IDM at "12. GNS Preferential Electricity Rate for Port Hawkesbury"; *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia: Final Affirmative Countervailing Duty Determination*, 75 FR 59209 (September 27, 2010), and accompanying IDM at "1. GOI Provision of Standing Timber for Less Than Adequate Remuneration"; *Laminated Woven Sacks from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination, in Part, of Critical Circumstances*, 73 FR 35639 (June 24, 2008), and accompanying IDM at "1. Provision of Land for Less Than Adequate Remuneration"; *Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products from Thailand*, 66 FR 50410 (October 3, 2001), *and accompanying* IDM at "B. Provision of Electricity for Less Than Adequate Remuneration"; and *Steel Wire Rod from Trinidad and Tobago*, 62 FR at 55006-07.
[88] *See SC Paper* IDM at 47 ("As guided by the *CVD Preamble*, we continue to determine that under their normal rate setting philosophy, the NSUARB and NSPI set "above-the-line" rates in accordance with market principles for regulated monopolies when the cost-of-service method is employed (including the FAM). These rates fully incorporate the costs of fuel, generation, transmission, and distribution. Under this method of rate setting, there is a sufficient guaranteed rate of return to ensure future operations because all costs are covered, and, in order to ensure adequate investment, investors are guaranteed a rate of return on equity that is competitive with similarly risky investments available in the market").
[89] *Id.* at 48.
[90] *Id.*
[91] The GOK provided identical information on the record of the 2017 administrative review of certain corrosion-

that KPX's price setting mechanism is consistent with market principles and, thus, no further action is necessary to determine a benefit.

As Commerce has determined there is no benefit, the comments regarding financial contribution, specificity, and the application of the upstream subsidy methodology are moot.

Comment 2: Whether the Subsidy Rate for ITIPA Grants Was Improperly Calculated

Petitioners Case Brief

- ITIPA is a single subsidy program. Commerce deviated from its established calculation methodology for ITIPA grants by treating each individual grant as a separate program, and, thus, it preliminarily determined that the grants did not confer a benefit to Hyundai Steel.[92]
- Commerce's established practice, used in the previous review, is to divide the total value of the grants by the respondent's total sales. Commerce should use this methodology here and find that the program conferred a measurable benefit that should be included in Hyundai Steel's subsidy rate.[93]

Hyundai Steel Rebuttal Brief

- The grants reported are not part of a single subsidy program as the petitioners argue, and they should not be treated as such. In addition to 19 grants under ITIPA, Hyundai Steel received one grant under the Defense Acquisition Program Act (DAPA) and one grant under the Information and Communications Technology Industry Promotion Act (ICTIPA).[94]
- Further, companies apply for these grants with different government agencies and each grant is for a specific R&D project.[95]
- Even if Commerce chooses to sum up the grants, it should not include the grants not received under ITIPA, *i.e.*, grants received under DAPA and ICTIPA.[96] Under this methodology, the calculation still would result in a benefit of less than 0.005 percent.[97]

resistant steel products from the Republic of Korea, and such information was verified in that proceeding. *See* GOK Verification Report.

[92] *See* Petitioners Case Brief at 8-13.

[93] *Id.* at 8-13.

[94] *See* Hyundai Steel Rebuttal Brief at 10-11.

[95] *Id.* at 11; *see also* Hyundai Steel's Letter, "Certain Hot-Rolled Steel Flat Products from the Republic of Korea, Case No. C-580-884: Response to Section III of Initial Questionnaire," dated April 2, 2019 (Hyundai Steel IQR) at 58-60 and Exhibit K-3.

[96] *Id.* at 12-13.

[97] *Id.*

GOK Rebuttal Brief

- Commerce's treatment of each ITIPA grant as a separate program is correct and consistent with its practice in other cases.[98]
- Each ITIPA program grant is different and independent in various aspects including its period, companies engaged, and the topic. Therefore, Commerce should continue to treat each ITIPA R&D grant as a separate program.[99]

Commerce's Position: Based on parties' arguments and upon reviewing prior cases, we have revised our calculation methodology for the ITIPA program.[100] The *CVD Preamble* provides guidance in the context of the 0.5 test used for determining whether to allocate or expense non-recurring benefits over time. The *CVD Preamble* states that "we will apply the 0.5 percent test to all benefits associated with a particular program, not each individual benefit, if there are more than one."[101] Further, the *CVD Preamble* notes that Commerce will calculate an *ad valorem* subsidy rate by dividing the amount of the subsidy benefit by the sales value of the product or products to which the subsidy is attributed.[102] In addition, when encountering similar situations in the past, Commerce rounded only the total program rates and not individual project rates or individual cross-owned company rates.[103] Therefore, we summed the benefits from grants received during the POR and divided this total benefit by Hyundai Steel's total sales, rounded to four decimal places, resulting in an *ad valorem* rate of zero percent.[104] We note that in *Corrosion-Resistant Flat Rolled Products from Korea*, Commerce determined that two of the three grants received by HYSCO were tied to non-subject merchandise, and we excluded those grants from the subsidy calculation.[105] However, in the instant review, Hyundai Steel reported that the grants received were not tied to any particular product.[106] Therefore, we did not exclude any of the ITIPA grants from our calculation.

With regard to the grants reported by Hyundai Steel under DAPA and ICTIPA,[107] for this administrative review, Hyundai Steel reported DAPA and ICTIPA as separate programs from ITIPA. Nothing on the record of this administrative review contradicts Hyundai Steel's reporting that these are separate programs. Therefore, we have not included these grants under the ITIPA program, but rather as separate R&D grants. Using the same methodology described above, we calculated a separate rate each for DAPA and ICTIPA, which also resulted in *ad valorem* rates of zero percent.[108]

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[98] *See* GOK Rebuttal Brief at 2.
[99] *Id.* at 2-3.
[100] *See e.g.*, *CORE Korea 2017 Final* IDM at Comment 2.
[101] *See CVD Preamble*, 63 FR at 65394.
[102] *Id*., 63 FR at 65399.
[103] *See Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from India: Final Affirmative Determination*, 81 FR 49932 (July 29, 2016), and accompanying IDM at Comment 5.
[104] *See* Memorandum, "Final Results Calculation for Hyundai Steel Company," dated concurrently with this Memorandum (Hyundai Steel Final Results Calculation Memorandum).
[105] *See Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Preliminary Results of Countervailing Duty Administrative Review; 2011*, 78 FR 55241 (September 10, 2013), and accompanying PDM at 19.
[106] *See* Hyundai Steel IQR at 58-60 and at Exhibit K-2, K-3, K-4 and K-5.
[107] *Id.* at 34.
[108] *See* Hyundai Steel Final Results Calculation Memorandum.

Comment 3: Whether the Tax Programs Under the RSLTA and RSTA Meet the Specificity Requirement

GOK Case Brief

- Commerce's preliminary finding that the tax credit under RSLTA Article 78 is specific is erroneous. The GOK has explained that the program is not regionally-specific as its purpose is to encourage investments into Korea regardless of its region.[109]
- The GOK did not limit benefits to enterprises located within designated geographical regions, but rather benefits are open to all enterprises in Korea except for those in a very small portion of territory, *i.e.*, the Seoul Metropolitan Area. Enterprises in the Seoul Metropolitan Area are ineligible because that region is overcrowded. Thus, this program is not countervailable.[110]
- With respect to tax credits under RSTA 25(2) and 25(3) preliminarily found to be *de facto* specific, Commerce's interpretation of "actual recipients are limited in number" in section 771(5A)(D)(iii)(I) of the Act is not in accordance with rulings by the United States Court of International Trade (CIT) or statements in the Statement of Administrative Action on the Agreement on Subsidies and Countervailing Measures (SAA).[111]
- For instance, the CIT has stated that discounts provided under the Voluntary Curtailment Adjustment program[112] were distributed to a large number of customers, across a wide range of industries, and this finding was based on information provided by the GOK that 190 customers received benefits.[113] Commerce's interpretation of the phrase "actual recipients are limited in number" in section 771(5A)(D)(iii)(I) of the Act is not in accordance with the interpretation of the CIT.[114]
- In another instance, with respect to a tax program which allowed a deduction of 200 percent of training expenses from taxable income,[115] the CIT expressly took the opinion that the tax laws do not provide subsidies which are specific to the taxpayer if their terms are generally available. The CIT rejected the broader rationale that, as a rule, generally-available benefits are not subsidies, and it recognized that the laws of taxation do not provide subsidies to the taxpayer unless the laws are selective in their terms or in their administration.[116]

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[109] *See* GOK Case Brief at 6. It appears the GOK unintentionally referred to RSLTA Article 26 in its arguments (the GOK states that it "has continuously explained that RSLTA Article 26 is not regionally specific in terms of its application."). Given the title of the header of this argument ("RSLTA – Local Tax Exemptions on Land Outside Metropolitan Areas – Article 78: Not regionally specific"), and the context of the argument, Commerce is treating this argument as it relates to RSLTA Article 78 only.

[110] *Id.*

[111] *Id.* at 6-7.

[112] *Id.* at 8, *see also Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea*, 64 FR 73176 (December 29, 1999) (*Steel Plate from Korea*) (with regard to the Voluntary Curtailment Adjustment program).

[113] *See* GOK Case Brief at 8-11 (citing *Bethlehem Steel v. United States*, 140 F. Supp. 2d 1354 (CIT 2001)).

[114] *Id.*

[115] *Id.* at 8; *see also Final Affirmative Countervailing Duty Determinations and Countervailing Duty Orders; Certain Steel Products from South Africa*, 47 FR 39379, 39380 (September 7, 1982) (*Steel from South Africa*) (with regard to the Employee Training Program).

[116] *See* GOK Case Brief at 8 (citing *Bethlehem Steel v. United States*, 590 F. Supp. 1237 (CIT 1984)).

- The CIT has also implied that things such as public highways and bridges, as well as tax credits for expenditures on capital investment, if available to all industries and sectors, should not be determined to be *de facto* specific.[117]
- The SAA also implies that *de facto* specificity should not be found if the actual users of the program are too large in number to reasonably be considered a specific group. Thus, according to the SAA, Commerce needs to consider whether the number of enterprises or group of enterprises is small enough to be considered specific.[118]
- Based on the CIT's opinions above and the SAA, Commerce should not determine that the various RSTA tax credit programs are *de facto* specific by relying solely on the actual number of recipients, nor should it compare the number of recipients who used a program to the total number of tax returns filed.[119]

Petitioners Rebuttal Brief

- Commerce should follow established practice and continue to countervail tax programs under RSLTA and RSTA.[120]
- The GOK reported that there were no changes to any of the RSLTA or RSTA tax programs during the POR and did not provide any new information on the record to distinguish the facts of this proceeding from those in previous proceedings where Commerce has found these tax programs to be specific and countervailed them accordingly.[121]
- Commerce has already rejected similar arguments in other proceedings.[122]

Commerce's Position: We disagree with the GOK's contention that the RSLTA Article 78 program is not regionally-specific. Similar to *Coated Free Sheet Paper from Korea*[123] and *CTL*

[117] *Id.* at 9-11 (citing *Carlisle Tire & Rubber Co. v. United States*, 564 F. Supp. 834 (CIT 1983)).
[118] *Id.* at 10.
[119] *Id.* at 10-11.
[120] *See* Petitioners Rebuttal Brief at 5-6.
[121] *Id.* at 6.
[122] *Id.* at 6 (citing *e.g.*, *Countervailing Duty Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea: Preliminary Affirmative Determination*, 80 FR 68842 (November 6, 2015), and accompanying PDM at 17-18, unchanged in *Certain Corrosion-Resistant Steel Products from the Republic of Korea: Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2015-2016*, 84 FR 11749 (March 28, 2019) (*CORE Korea 2015-2016 Final*); *Certain Corrosion-Resistant Steel Products from the Republic of Korea: Preliminary Results of Countervailing Duty Administrative Review, and Rescission of Review, in Part; 2017*, 84 FR 48107 (September 12, 2019) (*CORE Korea 2017 Prelim*), and accompanying PDM at 16-18, unchanged in *CORE Korea 2017 Final* IDM at Comment 3; *Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Preliminary Results of Countervailing Duty Administrative Review, 2016*, 83 FR 51446 (October 11, 2018), and accompanying PDM at 16-18, 21, 23-24, unchanged in *Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Final Results of Countervailing Duty Administrative Review, 2016*, 84 FR 24087 (May 24, 2019); *Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Preliminary Results of Countervailing Duty Administrative Review; 2017*, 84 FR 60377 (November 8, 2019) (*CRS 2017 Prelim*), and accompanying PDM at 15-17, unchanged in *Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Final Results of Countervailing Duty Administrative Review; 2017*, 85 FR 38261 (June 26, 2020) (*CRS 2017 Final*)).
[123] *See, e.g.*, *Coated Free Sheet Paper from the Republic of Korea: Notice of Final Affirmative Countervailing Duty Determination*, 72 FR 60639 (October 25, 2007) (*Coated Free Sheet Paper from Korea*), and accompanying IDM at 12.

Plate from Korea,[124] we continue to find that this program is regionally-specific under section 771(5A)(D)(iv) of the Act. The GOK contends that the program does not limit benefits to enterprises located within designated geographical regions, but rather that benefits are open to all enterprises in Korea except for a very small portion of territory, *i.e.*, the Seoul Metropolitan Area. However, the geographical size of the landmass outside of the Seoul Metropolitan Area is not relevant to our decision, so long as the GOK designates that enterprises in a geographical region (*i.e.*, the Seoul Metropolitan Area) are excluded from these benefits. The percentage or respective size of land mass bears no relationship to regional specificity, or to the percentage of economic activities excluded under this program. Thus, we continue to find that the GOK established a designated geographical region to which this program is available, and that subsidies under RSLTA Article 78 are specific within the meaning of section 771(5A)(D)(iv) of the Act.[125]

Regarding the GOK's arguments concerning the *de facto* specificity determination made with respect to RSTA tax programs, namely, under RSTA Articles 25(2) and 25(3), section 771(5A)(D)(iii)(I) of the Act states that a subsidy is specific as a matter of fact if the actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number. Further, section 771(5A) of the Act states that "any reference to an enterprise or industry is a reference to a foreign enterprise or industry and includes a group of such enterprises or industries." The SAA states that "{t}he Administration intends to apply the specificity test in light of its original purpose, which is to function as an initial screening mechanism to winnow out only those foreign subsidies which truly are broadly available and widely used throughout an economy."[126] Therefore, in light of the SAA, the specificity provision in section 771(5A)(D)(iii)(I) of the Act is intended to capture those subsidies that are not broadly available and widely used throughout an economy. In order to determine whether these RSTA tax credits are broadly available and widely used throughout an economy as contemplated by the SAA, we examined the nominal number of recipients of these RSTA tax incentives, other than those determined to be either regionally-specific or *de jure* specific, and compared the actual number of the users of these RSTA tax incentives to the actual number of corporate tax returns.[127] On this basis, we find that these programs benefitted only a limited number of users, and, therefore, they are *de facto* specific.

The Voluntary Curtailment Adjustment Program in *Steel Plate from Korea* and the Employee Training Program in *Steel from South Africa*[128] are not applicable to this case. The SAA makes clear that when Commerce applies the *de facto* test, "the weight accorded to particular factors

[124] *See Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea: Final Results of Countervailing Duty Administrative Review; and Rescission of Countervailing Duty Administrative Review, in Part*, 83 FR 32840 (July 26, 2018) (*CTL Plate from Korea*), and accompanying IDM at 8.
[125] *See, e.g.*, *LDWP from Korea Final* IDM at 37-38; *Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Portland Hydraulic Cement and Cement Clinker from Mexico*, 48 FR 43063, 43065 (September 21, 1983); *see also* GOK's March 25, 2019 IQR at 23, 133-144; and *Preliminary Results* PDM at 11-12.
[126] *See* SAA at 929 (The SAA "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act …").
[127] *See* GOK's March 25, 2019 IQR at 133-144; *see also* PDM at 11-12.
[128] *See Steel from South Africa*, 47 FR 39383 at "II. Programs Determined Not To Be Bounties or Grants to Manufacturers, Producers, or Exporters of Certain Steel Products; D. Employee Training Programs."

will vary from case to case."[129] The courts have long recognized that Commerce's *de facto* specificity analysis is fact-intensive and case-specific.[130] Congress could have established a rigid formula or bright-line test to determine specificity, but it chose not to, given the fact-intensive nature of the inquiry, and the broad variety of circumstances under which subsidy programs operate. The analysis pertaining to the Voluntary Curtailment Adjustment Program in *Steel Plate from Korea* and the Employee Training Program in *Steel from South Africa* are based on the facts on those records involving different programs. Commerce cannot rely on the analysis of those determinations to determine whether a program in this case is *de facto* specific. Rather, according to the facts on this record, we determine that this program is *de facto* specific because the recipients are limited in number.[131]

Comment 4: Whether the Trading of the DRR Program is Countervailable

GOK Case Brief

- Commerce should revisit its conclusion in the *Preliminary Results* that the Trading of DRR program is countervailable.[132]
- The payments under the DRR program come neither from the GOK nor any public entities; rather, KPX runs the program with money collected from electricity consumers.[133]
- The program is purely market-driven from its financial perspective, and the GOK or public entities do not make a financial contribution.[134]
- Any and all electricity users in Korea can participate in the DRR program as long as the relevant conditions are met, and the KPX has no discretion in determining which company will take the benefit.[135]
- Therefore, Commerce should find that payments under the DRR program do not constitute a financial contribution, nor is the program specific. Thus, the program is not countervailable.[136]

Petitioners Rebuttal Brief

- Commerce should follow established practice and continue to countervail the DRR program.[137]
- The GOK reported that there were no changes to the DDR program during the POR and provides no new information on the record to distinguish the facts of this proceeding from previous proceedings where Commerce countervailed the program.[138]

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[129] *See* SAA at 931.
[130] *See, e.g., Geneva Steel v. United States*, 914 F. Supp. 563, 598 (CIT 1996) (*Geneva Steel*) (citing *PPG Industries, Inc. v. United States*, 928 F.2d 1568, 1577 (Fed. Cir. 1991) (*PPG I*), discussing *Cabot Corp. v. United States*, 620 F. Supp. 722, 732 (CIT 1985) ("A finding of *de facto* specificity requires a case by case analysis to determine whether there has been a bestowal upon a specific class.") (internal quotations omitted))).
[131] *See* GOK's March 25, 2019 IQR at 99-134; *see also Preliminary Results* PDM at 13-14.
[132] *See* GOK Case Brief at 2.
[133] *Id.* at 2-3.
[134] *Id.* at 3.
[135] *Id.* at 3-4.
[136] *Id.* at 2-4.
[137] *See* Petitioners Rebuttal Brief at 2-4.
[138] *Id.*

- Commerce has already rejected similar arguments that the GOK raised in other proceedings, and Commerce noted in those proceedings that Commerce had recently verified the program and continues to find it countervailable.[139]

Commerce's Position: We disagree with the GOK and continue to find that this program is countervailable for the final results. In its initial questionnaire response, the GOK provided the legal basis for the program as Article 31(5) of the Electricity Business Law and Chapter 12 of KPX's Rules on Operation of Electric Utility Market.[140] Further, the GOK stated that the payments made by KPX are received from KEPCO.[141] Commerce has previously found KEPCO and KPX to each be an "authority" within the meaning of section 771(5)(B) of the Act, and we continue to do so in this review.[142] In *LDWP from Korea Final*, which covers the same 2017 period as the instant review, Commerce stated:

> While the GOK claims that there is no separate budget allocated by the GOK to operate this program and that the source of payments to the aggregators comes from the KPX, in the *Preliminary Determination*, we found that KEPCO pays KPX to administer this program through funds KEPCO collects from electricity consumers. The GOK further reiterated during verification that funding for this program comes through KEPCO…
>
> Accordingly, because there is no information on the record regarding the source of the funds used by KPX to make payments to the aggregators other than information demonstrating that the funds are passed to KPX from KEPCO, and record evidence supports a continued finding that KEPCO and KPX are authorities, we continue to find that a financial contribution in the form of a direct transfer of funds from KPX is provided to companies participating in this program under section 771(5)(D)(i) of the Act, and that a benefit exists in the amount of the grant provided to Hyundai Steel and SeAH Steel in accordance with 19 CFR 351.504(a).[143]

In the instant review, the DRR program operated in the same manner, and there is no new information or different information with respect to this program on the record of this review.[144] Therefore, we continue to find that KEPCO and KPX are authorities within the meaning of section 771(5)(B) of the Act, a financial contribution in the form of a direct transfer of funds from KPX is provided under section 771(5)(D)(i) of the Act, and a benefit exists in the amount of the grant provided in accordance with 19 CFR 351.504(a). Further, we continue to find that the program is *de facto* specific under section 771(5A)(D)(iii)(I) of the Act, as the actual recipients were limited in number.[145]

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[139] *Id.* at 4.
[140] *See* GOK's March 25, 2019 IQR at Exhibits ENERGY-1, ENERGY-2, ENERGY-3, and ENERGY-4.
[141] *Id.* at 32; *see also Preliminary Results* PDM at 15.
[142] *See, e.g., Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea: Final Results of Countervailing Duty Administrative Review and Rescission of Countervailing Duty Administrative Review, in Part*, 82 FR 39410 (August 18, 2017), and accompanying IDM at 20; and *LDWP from Korea Final* IDM at 35.
[143] *See LDWP from Korea Final* IDM at 35-36.
[144] *See* GOK's March 25, 2019 IQR at Exhibits ENERGY-1, ENERGY-2, ENERGY-3, and ENERGY-4.
[145] *Id.* at 234-235; *see also CTL Plate from Korea* IDM at 7.

Comment 5: Whether the Modal Shift Program Confers a Countervailable Benefit

GOK Case Brief

- The modal shift program was established pursuant to the GOK's environmental policy, and not for the GOK's economic interests. The GOK conducted research and benchmarked programs in other countries before adopting this program.[146]
- Companies would not use this program if they only considered their economic interest. However, they choose to support the good of society and enhance environmental conditions at the expense of their economic interests.[147]
- The GOK compensates 30 percent of a company's research expenses to comply with the policy.[148] This program does not provide any economic benefits.[149]
- It is not appropriate to conclude that the program provides a benefit to recipients given that they suffer from economic losses rather than receiving economic benefits.[150]
- According to the dictionary, the term "benefit" means "something that produces good or helpful results or effects or that promotes well-being. Commerce should interpret the term "benefit" in section 771(5)(E) of the Act as implicitly embracing the meaning of "better off" in comparison to where no subsidies exist.[151]
- Hyundai Steel enjoyed partial compensation for the loss incurred in adhering to the national environmental policy and there was no benefit making Hyundai Steel "better off" than it would otherwise have been. Therefore, Commerce should determine the program does not confer a countervailable benefit.[152]

Petitioners Rebuttal Brief

- Commerce should follow established practice and continue to countervail the Modal Shift program.[153]
- The GOK reported that there were no changes to the Modal Shift program during the POR and did not provide new information on the record to distinguish the facts of this proceeding from previous proceedings where Commerce countervailed this program.[154]

Commerce's Position: As an initial matter, we note that the GOK has not disagreed that this program is intended to assist companies in recouping losses, which are incurred as a result of adhering to the GOK's transportation environmental policies. Through its Sustainable Transport and Logistics Development Act, the GOK provides support to entities to promote a shift towards a greater use of environment-friendly means of transportation.[155] Rather, the GOK argues that this program is not countervailable because it does not cover all the losses incurred and does not provide an additional benefit to companies that switch from truck to marine transport. When determining whether an alleged program is countervailable, the Act directs Commerce to

[146] *See* GOK Case Brief at 5.
[147] *Id.* at 5.
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *See* Petitioners Rebuttal Brief at 4-5.
[154] *Id.*
[155] *See* GOK's March 25, 2019 IQR at Exhibit MODAL-1 and MODAL-2.

determine whether there is a subsidy, *i.e.*, a financial contribution is conferred by an authority, which confers a benefit to the recipient, and that the subsidy is specific to an enterprise or industry.[156] Further, the Act does not contemplate that the benefit determination should take into account any secondary effects, such as losses incurred.[157]

As described in the *Preliminary Results*, Commerce determined first whether the Modal Shift program met the criteria for a countervailable subsidy by analyzing whether it provided a financial contribution, was specific, and conferred a benefit to Hyundai Steel.[158] The evidence on the record supports all three criteria, as discussed in the *Preliminary Results*.[159] Therefore, because the GOK did not identify any evidence on the record which refutes our finding in the *Preliminary Results*, we continue to determine that this program is countervailable.

Comment 6: Whether Commerce Correctly Measured the Benefit for Port Usage Rights at Incheon Harbor

In the *Preliminary Results*, Hyundai Steel reported receiving benefits from the provision of port usage rights at the Port of Incheon program.[160] Commerce determined that the net subsidy rate for this program was not measurable.

Petitioners Case Brief

- Hyundai Steel reported the benefit the company received from its operation of the wharf at Incheon Harbor; this included berthing fees from shipping companies that used the wharf to ship merchandise to Hyundai Steel.[161] However, Commerce should include in its benefit calculation income from certain fees Hyundai Steel did not receive, but had the right to receive and made the business decision not to.[162]
- Hyundai Steel ignores the fact that the only reason it was in the position not to collect certain income is because it acquired the right from the GOK to operate and use the port. If Hyundai Steel was not the sole operator of the port, Hyundai Steel, or any other party using the port on behalf of Hyundai Steel, would be required to pay such fees.[163]
- With respect to income from third parties, Hyundai Steel receives a benefit by maintaining the right to collect certain fees, and this benefit does not disappear simply because Hyundai Steel decides not to collect such fees. By using the port solely for its own shipments and not those of third parties, Hyundai Steel is choosing not to collect fee payments from third parties. Regardless of whether Hyundai Steel actually collected

[156] *See* generally section 771(5) of the Act.
[157] *See CVD Preamble*, 63 FR at 65361 ("Section 771(5B)(D) of the Act treats the imposition of new environmental requirements and the subsidization of compliance with those requirements as two separate actions. A subsidy that reduces a firm's cost of compliance remains a subsidy (subject, of course, to the statute's remaining tests for countervailability), even though the overall effect of the two government actions, taken together, may leave the firm with higher costs."); *see also* section 771(5)(C) of the Act (stating that Commerce is "not required to consider the effect of the subsidy in determining whether a subsidy exists").
[158] *See Preliminary Results* PDM at 16.
[159] *Id*.; *see also* GOK Verification Report at 8-9.
[160] *See Preliminary Results* PDM at 17.
[161] *See* Petitioners Case Brief at 3 (the specific name of the income in question is business proprietary information).
[162] *Id.* at 3-4.
[163] *Id.* at 4-5.

these fees, this income constitutes revenue forgone by the GOK and, thus, Commerce should account for it in the final subsidy rate calculations.[164]

- In the final results, Commerce should measure the amount of forgone income by multiplying the specific fee rate reported by Hyundai Steel by the volume of cargo shipped through Hyundai Steel's wharf at Incheon Harbor, as reported by the petitioners.[165]

Hyundai Steel Rebuttal Brief

- In the *Preliminary Results*, Commerce limited its benefit calculation under this program to berthing fee income. Because Commerce found no measurable benefit from the provision of port usage rights at the Port of Incheon, Commerce did not examine the countervailability of the program.[166]
- The petitioners present an argument to include specific income that Hyundai Steel could have received in the benefit calculation for this program; however, the petitioners provide no basis for Commerce to apply facts available here.[167] Commerce issued no deficiency questionnaire following Hyundai Steel's new subsidy allegation (NSA) SQR submission, nor did the petitioners file comments or raise any issues regarding that response.[168]
- The program alleged by the petitioners and initiated upon by Commerce stated that a benefit exists in the "amount of revenue forgone, to the extent that the value of Hyundai Steel's exemptions from port usage fees and direct reimbursements exceed the costs incurred by Hyundai Steel in constructing the port."[169] Thus, this program links the receipt of a benefit from fee exemptions or reimbursements to whether they "exceed the costs incurred by Hyundai Steel in constructing the port."[170]
- Nowhere in the petitioners' brief do the petitioners demonstrate, or even argue, that these alleged "benefits" from this income that Hyundai Steel could have received resulted in the receipt of a benefit that exceeds the costs that Hyundai Steel incurred in constructing the Incheon Port. Thus, the petitioners fail to allege the existence of any benefit under their own allegation that served as the basis for Commerce's initiation of this program.[171]
- Hyundai Steel reported that, although it had the right to collect specific income from third parties, it did not receive this specific income because no third parties used the port.[172]
- The petitioners misinterpreted Hyundai Steel's response and conflated its arrangement with its harbor operator.[173]
- Hyundai Steel's right to collect such fees is granted as a repayment of a debt and is not a grant or benefit provided to Hyundai Steel. The CIT's decision in *Government of Sri Lanka v. United States* is instructive on the point that reimbursements of this kind are not benefits and, thus, are not countervailable.[174]

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[164] *Id.*
[165] *Id.* at 6-8.
[166] *See* Hyundai Steel Rebuttal Brief at 3.
[167] *Id.*
[168] *Id.* at 10 (citing NSA SQR).
[169] *Id.* at 4.
[170] *Id.*
[171] *Id.*
[172] *Id.* at 5-6.
[173] *Id.*
[174] *Id.* at 7-10 (citing *Government of Sri Lanka v. United States*, 308 F. Supp. 3d at 1381).

Commerce's Position: After examining the information on the record, for the final results, we find that Hyundai Steel received additional benefits under this program that are, as facts available, measurable. Our analysis of the additional benefits is set forth below.

Hyundai Steel self-reported this program in its initial response to the CVD questionnaire.[175] Thereafter, the petitioners submitted an NSA related to this program; based on the allegation by the petitioners, Commerce initiated an investigation of this program.[176]

The GOK granted Hyundai Steel the right to operate and use the port of North Incheon for its own operations, as well to collect fees from shipping operators and third-party users.[177] As part of its agreement with the GOK, Hyundai Steel reported that it was scheduled to recover its investment costs by obtaining income from two sources: berthing income from shipping operators and "other" income from itself and third-party users through using and operating the North Incheon Harbor.[178] Hyundai Steel reported the actual berthing fees it received from 2007 through 2017 from shipping operators.[179]

In the *Preliminary Results*, we first determined whether Hyundai Steel received a measurable benefit under this program.[180] To calculate the program's benefit, we divided the POR berthing income by Hyundai Steel's total free on board (or FOB) sales value and determined a subsidy rate of less than 0.005 percent, *i.e.*, not measurable.[181]

Throughout this review, Hyundai Steel has maintained that, because third parties have not used North Incheon Harbor, Hyundai Steel has not collected any of the "other" income it was entitled to under its agreement with the GOK.[182] The petitioners now argue that Commerce should factor this "other" income into Hyundai Steel's benefit calculation.[183]

We agree with the petitioners that Hyundai Steel received a benefit related to the "other" income that it was entitled to receive in connection with its own usage of the port. As discussed in the Final Analysis Memorandum, we find that Hyundai Steel did receive a financial contribution because certain fees represent revenue forgone within the meaning of section 771(5)(D)(ii) of the

[175] *See* Hyundai Steel IQR at 58-60.
[176] *See* Memorandum, "New Subsidy Allegations," dated August 12, 2019 (NSA Memo) at 4.
[177] *See* NSA SQR at 1.
[178] *See* NSA SQR at 2 (referring to the "Revised Incheon Agreement," a revision to the North Incheon Harbor Agreement between Hyundai Steel and the GOK, which were provided in Exhibit NSA-2, and Exhibit NSA-1, respectively, in the NSA QR (*see* Hyundai Steel's Letter, "Certain Hot-Rolled Steel Products from the Republic of Korea, Case No. C-580-884: Hyundai Steel New Subsidy Allegations Questionnaire Response," dated August 23, 2019 (NSA QR))). The "other" income we note is proprietary information.
[179] *See* NSA QR at Exhibit NSA-3.
[180] *See Preliminary Results* PDM at 17.
[181] *See* Memorandum, "Countervailing Duty Administrative Review of Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Preliminary Results Calculations for Hyundai Steel Co., Ltd.," dated December 5, 2019 (Preliminary Calculations Memo) at 4 and at Attachment II.
[182] *See* NSA SQR at 4.
[183] *See* Petitioners Case Brief at 4. Commerce discusses the petitioners' argument, and Hyundai Steel's rebuttal arguments, which are proprietary in nature, in the Final Analysis Memorandum. *See* Hyundai Steel Final Results Calculation Memorandum.

Act.[184] Further, we find that, because necessary information is not available on the record with respect to these fees, it is appropriate to calculate the benefit based on facts available, pursuant to section 776(a)(1) of the Act. As facts available, therefore, we have determined that the benefit of this program should be measured using the fee reported by Hyundai Steel.[185] We have applied this rate to the volume of cargo Hyundai Steel reported during the POR.[186] When added to the reported berthing income, we determine that Hyundai Steel has received a measurable benefit from this program.

Hyundai Steel argues that this program should not be countervailed and that, even when using the benefit that the petitioners allege Hyundai Steel received, the benefit does not exceed the costs that Hyundai Steel incurred in constructing the port of North Incheon.[187] Therefore, according to Hyundai Steel, Commerce should find that any benefit that Hyundai Steel received from this program during the POR is not measurable.

As we have explained above, we are determining that as adverse facts available, the program provides a financial contribution. Further, consistent with prior proceedings, Commerce has treated this program as a recurring grant program and has determined that the benefit is equal to the amount of fees reported foregone during the POR.[188]

We disagree with Hyundai Steel that Commerce should compute the benefit using only income to Hyundai Steel which exceeded the cost of constructing the port of North Incheon. For the reasons we have provided in past cases, Commerce has consistently not included an offset for the cost of constructing the port in its benefit analysis.[189]

We disagree with Hyundai Steel that, in general, these reimbursements are not benefits and, thus, are not countervailable. The essence of this program is that the GOK helped Hyundai Steel build a port for its own use for a very long time. The way the GOK provided the benefit for this program is through reimbursements as well as foregoing revenue that the GOK was entitled to

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[184] *Id.* As discussed above, we have relied on AFA to determine that this program provides a financial contribution and is specific.

[185] *See* NSA QR at Exhibit NSA-9. Because Hyundai Steel has claimed business proprietary treatment for the nature of these fees, we are unable to discuss them here. For further discussion, *see* Hyundai Steel Final Results Calculation Memorandum.

[186] *See* NSA SQR at Exhibit NSA2-1; *see also* Hyundai Steel Final Results Calculation Memorandum.

[187] Hyundai Steel reported its reimbursement schedule, which sets out the yearly projections for Hyundai Steel to recover its project costs through the collection of berthing and "other" income. The petitioners calculated an "other" income estimated amount that is less than the amount of "other" income Hyundai Steel was projected to recover during the POR. Therefore, the record indicates that, even using the petitioners' calculated amount, the benefits did not yet exceed the cost incurred by Hyundai Steel in constructing the port. *See* NSA QR at Exhibit NSA-2 at Appendices 7 and 8.

[188] *See e.g.*, *Notice of Final Results of Countervailing Duty Administrative Review: Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea*, 72 FR 38565 (July 13, 2007) and accompanying IDM at 6-7 and Comment 1; *Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Preliminary Results of Countervailing Duty Administrative Review; 2011*, 78 FR 55241 (September 10, 2013) and accompanying PDM at 11, unchanged *in Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Final Results of Countervailing Duty Administrative Review; 2011*, 79 FR 5378 (January 31, 2014); and *Notice of Final Affirmative Countervailing Duty Determination: Certain Cold-Rolled Carbon Steel Flat Products from the Republic of Korea*, 67 FR 62102 (October 3, 2002) and accompanying IDM at 20 and Comment 11.

[189] *Id.*

collect. For that reason, no offsets to Hyundai Steel's benefit calculation for this program are warranted. The facts in *Government of Sri Lanka v. United States* are in contrast to the facts in this review and are distinguishable. In *Government of Sri Lanka v. United States*, the CIT characterized payments under the GPS program as interest-free repayment of a debt rather than "a direct transfer of funds," and it held that the payments constituted reimbursement of an interest-free debt that did not benefit the tire producer.[190] In the *Tires Sri Lanka Final*,[191] we determined that the government's payments to the respondent were direct transfers of funds and countervailable in their full amount (treating the respondent's earlier payment of the "guaranteed price" to its producer as irrelevant).[192] However, the CIT found that we had erroneously assessed the reimbursements in isolation from the GPS program because the tire producer was being required to provide the government an interest free loan by paying an above-market price for which it was later reimbursed. The CIT concluded that Commerce ignored record evidence that the respondent received payment corresponding exactly to the above-market portion of its payment to the small-scale farmer, paid on behalf of the government.[193]

Further, we find that the Harbor Act program in this review is not comparable to the GPS program that the CIT analyzed in *Government of Sri Lanka v. United States*. The two programs are distinguishable in the way that they work (*i.e.*, producer overpayment for an input in the *Tires Sri Lanka Final*, versus exemption of the usage fee, thereby granting Hyundai Steel free usage of the facility in the instant review) and, importantly, the type of benefit at issue (*i.e.*, a direct transfer of funds in the *Tires Sri Lanka Final* versus revenue forgone with regard to certain income in this program). In *Government of Sri Lanka v. United States*, the CIT characterized the transaction at issue as resulting in a detriment, rather than a benefit, to the respondent in that case.[194] In this review, however, there is no evidence on the record demonstrating that Hyundai Steel's building of a port, the GOK's subsequent assumption of ownership of the port, and Hyundai Steel's exemption from payment of port usage fees, resulted in a detriment to Hyundai Steel. Therefore, Hyundai Steel's reliance on *Government of Sri Lanka v. United States* is inapposite and does not support its request that Commerce provide offsets to its benefit calculations.

Finally, we disagree with the petitioners that it is appropriate to include in the benefit calculation theoretical revenue that Hyundai Steel could have collected from other third parties. The petitioners argue that the

> benefit Hyundai Steel receives by maintaining the right to collect {certain} income does not disappear simply because the respondent makes the business decision not to collect {other} income. Instead, by using the port solely for its own shipments and not those of third parties, Hyundai Steel is choosing not to collect fee payments from third parties. Regardless of whether Hyundai Steel actually collected these fees, this {other} income

[190] *See Government of Sri Lanka v. United States*, 308 F. Supp. 3d at 1381.
[191] *See Certain New Pneumatic Off-the-Road Tires from Sri Lanka: Final Affirmative Countervailing Duty Determination, and Final Determination of Critical Circumstances*, 82 FR 2949, 2950 (January 10, 2017) (*Tires Sri Lanka Final*) and accompanying IDM.
[192] *See Tires Sri Lanka Final* IDM at Comment 4.
[193] *See Government of Sri Lanka v. United States*, 308 F. Supp. 3d at 1380-83.
[194] *Id.* at 1382.

> constitutes revenue {forgone} by the GOK and, thus, should be accounted for in {Commerce's} benefit calculations.[195]

As noted above, Hyundai Steel self-reported the receipt of benefits through the collection of berthing income under the program during the POR in its initial questionnaire response.[196] Further, in response to questionnaires issued in connection with the NSA, Hyundai Steel again reported that berthing income was the only benefit it received under this program. While Hyundai Steel acknowledged that it would have been entitled to receive "other" income as well, had other parties used the port, it stated that it did not actually receive such "other" income, and, thus, it had nothing to report.[197] Commerce normally calculates benefits at the time of receipt. Because Hyundai Steel did not receive this additional income from third parties, there is no basis for Commerce to factor it into our subsidy calculation. Additionally, Hyundai Steel states that it was entitled to receive this additional income from third-parties only, and that no third party used the port during the POR; therefore, the record indicates that there was no theoretical revenue for Hyundai Steel to collect.[198]

Comment 7: Whether the Suncheon Harbor Usage Fee Exemptions Under the Harbor Act Are Countervailable

Petitioners Case Brief

- In the *Preliminary Results*, Commerce determined that the Suncheon Harbor usage fee exemptions program was not used by Hyundai Steel.[199]
- Commerce should continue to countervail the Suncheon Harbor usage fee exemptions that Hyundai Steel reported that it received during the POR.[200]
- Commerce has previously rejected arguments by parties that this program is not countervailable, and it should continue to do so here.[201]

Hyundai Steel Rebuttal Case Brief

- Commerce clearly listed the Suncheon Harbor Usage Fees Exemptions program in the *Preliminary Results* section "Programs Preliminary Determined to be Not Used or Not to Confer a Measurable Benefit." Commerce's calculations show that the benefits Hyundai Steel received from usage fee exemptions at Suncheon Harbor did not confer a measurable benefit.[202]
- The petitioners' brief contains no information or argument that would change Commerce's approach for the final results, and, thus, Commerce should continue to find the usage fee exemptions at Suncheon Harbor not measurable.[203]

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[195] *See* Petitioners Case Brief at 4.
[196] *See* Hyundai Steel IQR at 58-60 and at Exhibit K-2, K-3, K-4 and K-5.
[197] *See* NSA QR at 1-2; *see also* NSA SQR at 3 and at Exhibit NSA-3.
[198] *See* NSA QR at 2.
[199] *See* Petitioners Case Brief at 14 (citing *Preliminary Results* PDM at 17-18; Preliminary Calculations Memo at 5-6).
[200] *Id.* at 14-15.
[201] *Id*.
[202] *See* Hyundai Steel Rebuttal Brief at 13 (citing *Preliminary Results* PDM at 17-18; and Preliminary Calculations Memo at 5-6).
[203] *Id.* at 14.

Commerce's Position: We continue to find that the usage fee exemptions at Suncheon Harbor did not confer a measurable benefit to Hyundai Steel during the POR. In the *Preliminary Results*, we listed this program under the section "Programs Preliminarily Determined to be Not Used or Not to Confer a Measurable Benefit," indicating that the programs included in the list either were not used or did not confer measurable benefits during the POR.[204] In the calculations accompanying the *Preliminary Results*, we measured whether a measurable benefit existed under this program[205] and found that Hyundai Steel did not receive a measurable benefit under this program, *i.e.*, the calculated rate was less than 0.005 percent *ad valorem*. Therefore, contrary to the petitioners' assertion, Commerce has found that Hyundai Steel did use this program, but it did not receive a measurable benefit during the POR.

Comment 8: Whether Hyundai Green Power is Hyundai Steel's Cross-Owned Input Supplier and Received Countervailable Benefits

Petitioners Case Brief

- Commerce should find that Hyundai Green Power is Hyundai Steel's cross-owned input supplier. Hyundai Steel and Hyundai Green Power cannot operate independently of each other, as evidenced in public statements by Hyundai Steel.[206]
- Commerce relied on its findings regarding Hyundai Green Power and Hyundai Steel from past proceedings, but it should instead view the record of each administrative review as separate and distinct.[207]
- The record of this review establishes that Hyundai Green Power supplies approximately 55 percent of Hyundai Steel's power demand in Dangjin, thereby confirming that Hyundai Green Power is an input supplier to Hyundai Steel.[208]
- In similar contexts, Commerce has focused on the economic reality of transactions in which inputs are supplied indirectly from an input producer to a downstream producer. Commerce should do the same here and treat Hyundai Green Power as an electricity *supplier*, irrespective of whether Hyundai Steel actually "purchased" electricity directly from Hyundai Green Power.[209]
- Commerce should find that Hyundai Green Power is Hyundai Steel's cross-owned input supplier and that the loans and equity infusions received by Hyundai Green Power constitute a countervailable benefit to Hyundai Steel.[210]
- The record demonstrates that Hyundai Green Power was not creditworthy at the time that some loans were provided. Under normal circumstance Hyundai Green Power would not have received the terms provided for some of these loans.[211]
- The record clearly establishes that Hyundai Green Power received a benefit from the GOK-backed equity infusions. Commerce has acknowledged that Korean government-

[204] *See Preliminary Results* PDM at 17-18.
[205] *See* Preliminary Calculations Memo at Attachment II (at "Various Other Grants").
[206] *See* Petitioners Case Brief at 18.
[207] *Id.* at 18-19.
[208] *Id.* at 20.
[209] *Id*.
[210] *Id.* at 15.
[211] *Id.* at 16-17.

owned entities are involved in equity infusions to Hyundai Green Power. Based on the limited information reasonably available, the petitioners demonstrated that these equity infusions were likely made in a manner inconsistent with that of a normal private investor, and, thus, Commerce should reconsider its determination in the final results.[212]

Hyundai Steel Rebuttal Brief

- Hyundai Steel and Hyundai Green Power are not cross-owned, and, thus, the issue of any subsidies received by Hyundai Green Power are moot.
- The *Preliminary Results* are in accord with the final results of *CORE Korea 2015-2016 Final*, [213] in which Commerce concluded that there was no cross-ownership between Hyundai Steel and Hyundai Green Power. The record in this proceeding demonstrates that Hyundai Green Power is not an input supplier to Hyundai Steel.[214]
- The record demonstrates that Hyundai Steel and Korea Midland Power are the largest minority shareholders in Hyundai Green Power, with each owning 29 percent of shares in Hyundai Green Power during the POR.[215] Commerce has previously stated that the fact that both Hyundai Steel and Korea Midland Power own 29 percent of shares of Hyundai Green Power "undercuts the petitioner's claim that Hyundai Steel is able to exert control over Hyundai Green Power." Hyundai Steel's ownership stake in Hyundai Green Power remains the same in this review, and, thus, Commerce's analysis holds.[216]
- Nothing in the public statements on the record demonstrate that Hyundai Steel has control over Hyundai Green Power. Commerce has analyzed these statements both in this segment of the proceeding and in past segments and has not found them persuasive evidence that Hyundai Steel has control over Hyundai Green Power.[217]
- Hyundai Green Power is not an input supplier to Hyundai Steel because Hyundai Steel purchases its electricity from KEPCO. Even if Hyundai Green Power supplied 55 percent of the electricity used at the Dangjin facility, as the petitioners contend, Hyundai Steel still had to purchase this electricity at rates set by KEPCO for all consumers and it, therefore, did not receive any benefit by virtue of the electricity's being produced by Hyundai Green Power.[218]
- Electricity is the type of input that cannot be primarily dedicated to the production of subject merchandise, as required by 19 CFR 351.525(b)(6)(iv), and, thus, should not be considered an input product.[219]
- Hyundai Green Power is not a cross-owned input supplier to Hyundai Steel and no new information was presented by the petitioners on the record of this proceeding to cause Commerce to reach a different conclusion than in previous segments. Moreover, Commerce did not state that it was relying on previous findings as suggested by the petitioners, but rather that its determination was consistent with previous findings.[220]

[212] *Id.* at 17.
[213] *See CORE Korea 2015-2016 Final*.
[214] *See* Hyundai Steel Rebuttal Brief at 18.
[215] *Id.* at 19.
[216] *Id.*
[217] *Id.* at 20.
[218] *Id.*
[219] *Id.* at 21.
[220] *Id.* at 21-22.

- In the NSA Memo and in the *Preliminary Results*, Commerce already determined that there is insufficient evidence on the record that the GOK provided countervailable subsidies to Hyundai Green Power through the provision of loans or equity infusions.[221]
- Commerce's regulations provide that "{i}n the case of firms not owned by the government, the receipt by the firm of comparable long-term commercial loans, unaccompanied by a government-provided guarantee, will normally constitute dispositive evidence that the firm is not uncreditworthy." Hyundai Green Power is not owned by the government and Hyundai Green Power has long-term commercial loans and had them in 2015, thereby demonstrating that it is not currently uncreditworthy and also was not uncreditworthy in 2015.[222]
- Hyundai Green Power has been profitable in every year since the start of its operations in 2010, and it has also made dividend payments to its shareholders over the 2011 – 2017 period.[223]
- While the petitioners indicate that Korean government-owned entities are involved in equity infusions to Hyundai Green Power, the mere involvement of government-owned entities does not establish the provision of a benefit.[224]
- The unit purchase price of Hyundai Green Power's shares is the same for all investors, whether private or government; therefore, the equity infusion is not inconsistent with usual investment practices.[225]

Commerce's Position: Consistent with prior segments of this proceeding and other proceedings, we continue to find that Hyundai Steel and Hyundai Green Power are not cross-owned. Under 19 CFR 351.525(b)(6)(vi), cross-ownership exists between two or more corporations where one corporation can use or direct the individual assets of the other corporation in essentially the same way it can use its own assets. The regulation further states that the cross-ownership standard "normally" will be met "where there is majority ownership interest between two corporations or through common ownership of two (or more) corporations." The *CVD Preamble* further states that, in "certain circumstances, a large minority voting interest (for example, 40 percent) or a 'golden share' may also result in cross-ownership."[226] However, the *CVD Preamble* makes clear that the standard for finding cross-ownership is higher than the standard for finding affiliation and that a cross-ownership finding hinges on the ability of one party to have unilateral control over the other party's assets, including subsidy benefits:

> The underlying rationale for attributing subsidies between two separate corporations is that the interests of those two corporations have merged to such a degree that one corporation can use or direct the individual assets (or subsidy benefits) of the other corporation in essentially the same ways it can use its own assets (or subsidy benefits). The affiliation standard does not sufficiently limit the relationships we would examine to those where corporations have reached such a commonality of interests. Therefore, reliance upon the affiliated party definition would result in {Commerce} expending

[221] *Id.* at 14-15 (citing *Preliminary Results* PDM at 7-8); *see also* NSA Memo at 2-4.
[222] *See* Hyundai Steel Rebuttal Brief at 16.
[223] *Id.*
[224] *Id.* at 17.
[225] *Id.*
[226] *See CVD Preamble*, 63 FR at 65401.

> unnecessary resources collecting information from corporations about subsidies which are not benefitting the production of the subject merchandise, or diluting subsidies more properly attributed to input producers by allocating such subsidies over the production of remotely related and affected downstream producers. In response to the second comment, we note that varying degrees of control can exist in any relationship.
>
> Therefore, we believe the more precise definition of cross-ownership that we have adopted in these Final Regulations is more appropriate. Contrary to the assertions of the commenters, in limiting our attribution rules to situations where there is cross-ownership, we are not reading "affiliated" out of the CVD law – we simply do not find the affiliation standard to be a helpful basis for attributing subsidies. Nowhere in the statute or the SAA is there any indication that the affiliated party definition was intended to be used for subsidy attribution purposes. . . we do not intend to investigate subsidies to affiliated parties unless cross-ownership exists or other information, such as a transfer of subsidies, indicates that such subsidies may in fact benefit the subject merchandise produced by the corporation under investigation.[227]

We did not find cross-ownership between Hyundai Steel and Hyundai Green Power in the *Preliminary Results*,[228] which is consistent with our analysis detailed in our NSA Memo[229] and with our analysis conducted in other recent proceedings.[230] Furthermore, the petitioners have not provided any new information on the record or demonstrated that Commerce has not considered all the record information that would require a change to our preliminary finding.

Further, while the petitioners point out information on this record that suggests that the GOK loans and equity infusions that created Hyundai Green Power may have conferred a benefit, that information does not affect our determination with respect to whether cross-ownership exists. As noted above, the standard for finding cross-ownership is higher than the standard for finding affiliation, and only when the companies are found to be cross-owned will Commerce then consider the subsidies received by the cross-owned company and how they must be attributed. Absent cross-ownership, we find the petitioners' arguments regarding subsidies received by these alleged cross-owned companies and any consequent attribution to be moot and, thus, they do not need to be addressed. We will continue to evaluate new information in a subsequent administrative review regarding Hyundai Steel and Hyundai Green Power.

[227] *Id*.
[228] *See Preliminary Results* PDM at 7-8.
[229] *See* NSA Memo.
[230] *See CORE Korea 2017 Prelim* PDM at 9, unchanged in *CORE Korea 2017 Final*.

X. RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting the above positions. If accepted, we will publish the final results in the *Federal Register*.

☒	☐
Agree	Disagree

9/28/2020

X 

Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

Attachment

Scope of the Order

The products covered by this order are certain hot-rolled, flat-rolled steel products, with or without patterns in relief, and whether or not annealed, painted, varnished, or coated with plastics or other non-metallic substances. The products covered do not include those that are clad, plated, or coated with metal. The products covered include coils that have a width or other lateral measurement ("width") of 12.7 mm or greater, regardless of thickness, and regardless of form of coil (*e.g.*, in successively superimposed layers, spirally oscillating, *etc*.). The products covered also include products not in coils (*e.g.*, in straight lengths) of a thickness of less than 4.75 mm and a width that is 12.7 mm or greater and that measures at least 10 times the thickness. The products described above may be rectangular, square, circular, or other shape and include products of either rectangular or non-rectangular cross-section where such cross-section is achieved subsequent to the rolling process, *i.e.*, products which have been "worked after rolling" (*e.g.*, products which have been beveled or rounded at the edges). For purposes of the width and thickness requirements referenced above:

(1) where the nominal and actual measurements vary, a product is within the scope if application of either the nominal or actual measurement would place it within the scope based on the definitions set forth above unless the resulting measurement makes the product covered by the existing antidumping[231] or countervailing duty[232] orders on Certain Cut-To-Length Carbon-Quality Steel Plate Products from the Republic of Korea (A-580-836; C-580-837), and

(2) where the width and thickness vary for a specific product (*e.g.*, the thickness of certain products with non-rectangular cross-section, the width of certain products with non-rectangular shape, *etc*.), the measurement at its greatest width or thickness applies.

Steel products included in the scope of this order are products in which: (1) iron predominates, by weight, over each of the other contained elements; (2) the carbon content is 2 percent or less, by weight; and (3) none of the elements listed below exceeds the quantity, by weight, respectively indicated:

- 2.50 percent of manganese, or
- 3.30 percent of silicon, or
- 1.50 percent of copper, or
- 1.50 percent of aluminum, or
- 1.25 percent of chromium, or
- 0.30 percent of cobalt, or
- 0.40 percent of lead, or

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[231] *See Notice of Amendment of Final Determinations of Sales at Less than Fair Value and Antidumping Duty Orders: Certain Cut-To-Length Carbon-Quality Steel Plate Products from France, India, Indonesia, Italy, Japan and the Republic of Korea*, 65 FR 6585 (February 10, 2000).

[232] *See Notice of Amended Final Determinations: Certain Cut-to-Length Carbon-Quality Steel Plate from India and the Republic of Korea; and Notice of Countervailing Duty Orders: Certain Cut-To-Length Carbon-Quality Steel Plate from France, India, Indonesia, Italy, and the Republic of Korea*, 65 FR 6587 (February 10, 2000).

- 2.00 percent of nickel, or
- 0.30 percent of tungsten, or
- 0.80 percent of molybdenum, or
- 0.10 percent of niobium, or
- 0.30 percent of vanadium, or
- 0.30 percent of zirconium.

Unless specifically excluded, products are included in this scope regardless of levels of boron and titanium.

For example, specifically included in this scope are vacuum degassed, fully stabilized (commonly referred to as interstitial-free (IF)) steels, high strength low alloy (HSLA) steels, the substrate for motor lamination steels, Advanced High Strength Steels (AHSS), and Ultra High Strength Steels (UHSS). IF steels are recognized as low carbon steels with micro-alloying levels of elements such as titanium and/or niobium added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, titanium, vanadium, and molybdenum. The substrate for motor lamination steels contains micro-alloying levels of elements such as silicon and aluminum. AHSS and UHSS are considered high tensile strength and high elongation steels, although AHSS and UHSS are covered whether or not they are high tensile strength or high elongation steels.

Subject merchandise includes hot-rolled steel that has been further processed in a third country, including but not limited to pickling, oiling, levelling, annealing, tempering, temper rolling, skin passing, painting, varnishing, trimming, cutting, punching, and/or slitting, or any other processing that would not otherwise remove the merchandise from the scope of the order if performed in the country of manufacture of the hot-rolled steel.

All products that meet the written physical description, and in which the chemistry quantities do not exceed any one of the noted element levels listed above, are within the scope of this order unless specifically excluded. The following products are outside of and/or specifically excluded from the scope of this order:

- Universal mill plates (*i.e.*, hot-rolled, flat-rolled products not in coils that have been rolled on four faces or in a closed box pass, of a width exceeding 150 mm but not exceeding 1250 mm, of a thickness not less than 4.0 mm, and without patterns in relief);
- Products that have been cold-rolled (cold-reduced) after hot-rolling;[233]
- Ball bearing steels;[234]

[233] For purposes of this scope exclusion, rolling operations such as a skin pass, levelling, temper rolling or other minor rolling operations after the hot-rolling process for purposes of surface finish, flatness, shape control, or gauge control do not constitute cold-rolling sufficient to meet this exclusion.

[234] Ball bearing steels are defined as steels which contain, in addition to iron, each of the following elements by weight in the amount specified: (i) not less than 0.95 nor more than 1.13 percent of carbon; (ii) not less than 0.22 nor more than 0.48 percent of manganese; (iii) none, or not more than 0.03 percent of sulfur; (iv) none, or not more than 0.03 percent of phosphorus; (v) not less than 0.18 nor more than 0.37 percent of silicon; (vi) not less than 1.25

- Tool steels;[235] and
- Silico-manganese steels;[236]

The products subject to this order are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under item numbers: 7208.10.1500, 7208.10.3000, 7208.10.6000, 7208.25.3000, 7208.25.6000, 7208.26.0030, 7208.26.0060, 7208.27.0030, 7208.27.0060, 7208.36.0030, 7208.36.0060, 7208.37.0030, 7208.37.0060, 7208.38.0015, 7208.38.0030, 7208.38.0090, 7208.39.0015, 7208.39.0030, 7208.39.0090, 7208.40.6030, 7208.40.6060, 7208.53.0000, 7208.54.0000, 7208.90.0000, 7210.70.3000, 7211.14.0030, 7211.14.0090, 7211.19.1500, 7211.19.2000, 7211.19.3000, 7211.19.4500, 7211.19.6000, 7211.19.7530, 7211.19.7560, 7211.19.7590, 7225.11.0000, 7225.19.0000, 7225.30.3050, 7225.30.7000, 7225.40.7000, 7225.99.0090, 7226.11.1000, 7226.11.9030, 7226.11.9060, 7226.19.1000, 7226.19.9000, 7226.91.5000, 7226.91.7000, and 7226.91.8000. The products subject to the order may also enter under the following HTSUS numbers: 7210.90.9000, 7211.90.0000, 7212.40.1000, 7212.40.5000, 7212.50.0000, 7214.91.0015, 7214.91.0060, 7214.91.0090, 7214.99.0060, 7214.99.0075, 7214.99.0090, 7215.90.5000, 7226.99.0180, and 7228.60.6000.

The HTSUS subheadings above are provided for convenience and U.S. Customs purposes only. The written description of the scope of the order is dispositive.

nor more than 1.65 percent of chromium; (vii) none, or not more than 0.28 percent of nickel; (viii) none, or not more than 0.38 percent of copper; and (ix) none, or not more than 0.09 percent of molybdenum.

[235] Tool steels are defined as steels which contain the following combinations of elements in the quantity by weight respectively indicated: (i) more than 1.2 percent carbon and more than 10.5 percent chromium; or (ii) not less than 0.3 percent carbon and 1.25 percent or more but less than 10.5 percent chromium; or (iii) not less than 0.85 percent carbon and 1 percent to 1.8 percent, inclusive, manganese; or (iv) 0.9 percent to 1.2 percent, inclusive, chromium and 0.9 percent to 1.4 percent, inclusive, molybdenum; or (v) not less than 0.5 percent carbon and not less than 3.5 percent molybdenum; or (vi) not less than 0.5 percent carbon and not less than 5.5 percent tungsten.

[236] Silico-manganese steel is defined as steels containing by weight: (i) not more than 0.7 percent of carbon; (ii) 0.5 percent or more but not more than 1.9 percent of manganese, and (iii) 0.6 percent or more but not more than 2.3 percent of silicon.